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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

Civil No. 223

UNITED STATES OF AMERICA,
Plaintiff,

v.

SCHINE CHAIN THEATRES, INC., ET AL.,
Defendants

JURISDICTIONAL STATEMENT

Under Rule 12 of the Supreme Court 306 U. S. 694

The jurisdiction of the Supreme Court of the United States of the appeal in the above entitled case is based on section 238 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345, incorporating section 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29, as follows:—

Title 28, section 345: A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise: (1) Section 29 of Title 15. . . .

Title 15, Section 29: In every suit in equity brought in any district court of the United States under sections 1-7 of this title, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof.

The above entitled civil action is a complaint by the United States under section 4 of the Act of Congress of July 2, 1890, 26 Stat. 203, entitled an act to protect trade and commerce against unlawful restraints and monopolies, against nine defendants, alleging violations by them of sections 1 and 2 of said Act.

Said sections 4, 1 and 2 are included within sections 1-7 of the aforesaid title 15.

Judgment was entered herein on November 1, 1945. On November 8, 1945, the Court entered a supplementary judgment to suspend the operation of the judgment entered November 1, 1945 until Dec. 7, 1945. On that day the defendants filed a Motion in the District Court pursuant to Rule 62(b) and (c) of the Rules of Civil Procedure to stay the execution of or any proceeding to enforce any judgment or decree or order now effective or presumably effective herein pending final determination of defendants motion pursuant to Rule 52(b) *infra*. Said Motion expressly stated that the defendants did not by making the motion admit that any judgment or decree now is or will become effective against them until final determination of their motion under Rule 52(b). At the request of the plaintiff, and with consent of the defendants, the Court postponed the hearing of said motion until February 4, 1946.

On November 8, 1945, on motion and consent of both parties, the Court entered an order that the time in which any of the parties may move to amend the Court's findings

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or to make additional findings, or to amend the judgment is extended to December 7, 1945.

On November 10, 1945, the defendants filed a motion, pursuant to Rule 52(b) of the Rules of Civil Procedure, to amend the Court's findings of fact and conclusions of law, to make additional findings and conclusions of law, and to amend the judgment accordingly. This motion sought a reconsideration of certain basic findings of fact and the alteration of the conclusions of the Court. It was not addressed to mere matters of form, but raised questions of substance.

This motion tolled the time to appeal, *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177.

As so decided the allowance of an appeal before the decision of that motion would be premature and the sixty days limited by the aforesaid section 29 does not expire, at the earliest, until sixty days after the decision of the aforesaid motion to amend. An application within the sixty days aforesaid is timely and can be allowed effectively either before or after the expiration of the sixty days, *Matton Co.* v. *Murphy*, 319 U. S. 412, 414.

On or about February 1, 1946 the plaintiff filed a motion pursuant to Rule 52(b) of the Rules of Civil Procedure to amend the Court's findings of fact and conclusions of law and the judgment. This motion together with the defendant's motion under Rule 52(b) was heard by the Court on February 25, 1946, and on March 11, 1946 the Court filed its opinion and decision granting and denying in part each of said motions.

On March 29, 1946 the Court filed amended findings of fact and conclusions of law as indicated in said opinion and decision and concurrently therewith the Court filed an amended judgment.

The case is within the jurisdictional provisions relied on, *United States* v. *Crescent Amusement Company*, 323 U. S. 173.

Respectfully submitted,

EDWARD F. MCCLENNEN,
WILLARD S. MCKAY,
Attorneys for the nine defendants severally.

April 15, 1946.

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APPENDIX

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil No. 223

UNITED STATES OF AMERICA, Plaintiff,

v.

SCHINE CHAIN THEATRES, INC., et al., Defendants

APPEARANCES:

Wendell Berge, Assistant Attorney General; Robert L. Wright, John P. Claggett, Harold L. Schilz, Albert Boggess, Special Assistants to The Attorney General.

Philip Marcus, Milton Kalas, Special Attorneys.

George L. Grobe, United States Attorney; For the United States.

Edmund McCarthy, Attorney of record, Willard S. McKay, Edward F. McClennen, Saul F. Rogers, Arthur J. Homans, Arthur H. Whitemore, Howard M. Antevil, of Counsel for Defendants.

KNIGHT, District Judge:

This suit is brought by the United States to restrain violations of Sections 1 and 2 of the Sherman Act (28 Stat. 209, 15 U. S. C. Secs. 1 and 2). Schine Chain Theatres, Inc., a New York holding and service corporation, five other corporations in which Schine Chain Theatres, Inc. owns all the stock, to wit, Schine Theatrical Co., Inc., an operating company, Schine-Lexington Corporation, a holding company, Schine Enterprise Corporation, a service corporation, Schine Circuit, Inc., a service corporation, and Chesapeake Theatre Corporation, a holding corporation, and also three individuals, J. Meyer Schine, Louis Schine and John A. May, are the defendants. Hereinafter the corporate defendants will be referred to as "Schine", the "Schine Circuit" or as "the Circuit".

This organization has seen an exceedingly rapid growth. Its origin was the purchase by defendants J. Meyer Schine and Louis Schine of three theatres in Gloversville, New York, in 1920. In the twenty-one years following, these defendant corporations acquired, either as purchaser or as lessee, an interest in 175 theatres and in addition some 42 separate parcels of real estate for theatre purpose, or connected with such purpose. The development came about in this manner. Schine Chain Theatre, Inc., the parent corporation, was organized in 1920. The above-named subsidiary corporations came into being in the several years 1926, 1935, 1937 and 1938.

Steps following in line with the purpose of the "Schine Circuit" were the organization of realty holding corporations and what may be termed local corporations, or the taking over of others of such for the operations of theatres. Since 1931, there have been 118 theatre corporations in which an interest has been acquired by "Schine". As of the time of the commencement of this suit there were 62 of such operating corporations and in 48 of these "Schine" owned 100 percent of the stock, in 12, 50 percent. Schine operates 93 theatres in 73 towns (including cities). The towns run generally in population from 5000 to 35000 and include 39 in New York, 16 in Ohio, 8 in Kentucky, 7 in Maryland, 2 in Delaware and 1 in Virginia. In addition to its theatrical and realty operations, "Schine" has booked and bought for and supervised 37 theatres since 1931, and when this suit was brought there were 27 for which it so acted. Since 1928 the closed towns (those in which there was no opposition) show a total increase of 56. In 1941 there were only 3 towns in which Schine's competitors (hereinafter called independents) were playing major film product. In a single season, 1939-1940, Schine paid $1,647,-000 to six film companies. The "Schine Circuit" buying power beyond peradventure was extremely large, and its opportunity to utilize this power in the purchase of films to the detriment of its competitors is apparent. These defendants together control the largest independent theatre circuit in the country. For theatre acquisitions and capital improvements there has been expended admittedly upwards

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of $10,948,100, not including dividend payments on operating expenses and cash on hand.

Some of the computations as hereinbefore shown are not the same as those claimed either by the government or by the defendants. These computations are made from defendants' extensive answers to interrogatories. The differences are not of material moment. There are eight so-called major film companies: Fox, Loew, Paramount, Radio-Keith-Orpheum (RKO), Warner, Columbia, Universal and United Artists. Columbia and Universal produce and distribute films; United Artists only distributes; and the other companies both produce and distribute films and operate theatres. These eight companies supply "Schine" a large percent of the feature films used by him and together receive upwards of 75 percent of the total film rental paid by Schine. All of them originally were made parties to this suit, but all have since been dropped as such. However, each is claimed to have participated separately with Schine in the conspiracy charged and in aid of Schine's monopolization of the film exhibiting business. The principal sales office of each major distributor company is in New York City and that city serves theatres here involved. The methods of licensing and servicing of films is similar with each. Each has its district manager and branch manager. The feature films are mostly produced in California where the negatives are taken, the prints being generally manufactured in New York and New Jersey. Film license applications are solicited by salesmen from the branch office, and the delivery and return of films are made through the branch. Prints of films are sent from the various exchange offices in the various states to the exhibitors of the main office, though the recommendation for approval ordinarily is made by the branch manager who is close to the situation. It was the usual custom for the distributors to make license agreements for feature films for a period of a year commencing about September. These license agreements were made before the films were produced. Ordinarily each major producing company put out 40 to 60 feature films a year and these were released at the rate of about one a week. Now the practice generally is

to sell group pictures only after production and in groups rather than for a year.

The individual defendants hold the principal offices in the defendant corporations and hold other offices in the various so-called local corporations. They are the principal stockholders in the parent corporation and have general supervision of the operations of the circuit. The film buying for the circuit and the companies in which it had an interest was conducted through "Schine" or one of its subsidiaries. Lazar, a regional manager for "Shine" covering several states, and Silverman and Hensler, district managers, and one Insley, principally carried on negotiations for acquisitions, though the defendants Schine and May engaged directly in some, while one Lynch was "the Circuit's" chief film buyer. In circuit buying "Schine" generally negotiated deals with the division manager. The agreements so made are referred to as "master agreements and deal sheets," but these were usually followed by license agreements signed by the chief sales executive of the distributors.

To substantiate its claims that these defendants have violated the aforesaid provisions of the Sherman Act, the government contends that they have used their great buying power to suppress competition by bringing about various restrictions on the competitors' ability to compete, resulting in persuading the competitor either to sell to "Schine", operated on an inferior basis or join in pooling his interests with "Schine"; that this suppression has been brought about in various ways, to wit: by depriving independents of first and second run products, either entirely or to such a time as materially lessened income and force sales or abandonment, by implied threats voicing "Schine's" great bying power, by threats to construct theatre buildings to discourage other construction, by cutting admission prices, by inducing theatre sales through agreements to employ sellers, by fixing by agreement the duration of time and the distance within which an independent selling should not be permitted to compete and by unreasonable clearances obtained from the distributor. These generally are the claims. The defendants' denial make the issues.

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Section 1 of the Sherman Act provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states * * * is hereby declared to be illegal * * *", and

Section 2 of that Act provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monapolize any part of the trade or commerce among the several states, * * * shall be guilty of a misdemeanor."

Said the court in Northern Securities Co. *v.* United States, 193 U. S. 197 (404): "All that is added to the first section by section 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the States; and that the liability is extended to attempting to monopolize any part of such trade or commerce." " * * * the two sections overlap in the sense that a monopoly under section 2 is a species of restraint of trade under section 1." United States *v.* Socony-Vacuum Oil Co., 310 U. S. 150 (226).

Any question as regards the applicability of the Sherman Act in certain respects here shown has been clearly answered by the decision of the Supreme Court in United States *v.* Crescent Amusement Co., 323 U. S. 173. Under definitely comparable facts that Court held: 1. That this court has jurisdiction. 2. That it is immaterial whether the distributors or any one of them were members of a conspiracy or joined in the effort to monopolize. 3. That while the business or the showing of motion pictures is local, a combination of exhibitors may violate the Sherman Act by using their collective buying power to restrict or restrain competitors. 4. That the relationship between the circuit members is such that they may be capable of conspiring or combining with each other in violation of the Act. 5. That the circuit, in essence, is not a single exhibitor. "All three phases of the motion picture business * * * constitutes a part of interstate commerce." William Goldman Theatres, Inc. *v.* Loew's, opinion filed August, 1945 (3d C.).

In the Cresent case twelve theatre operating companies, and certain individual stockholders, as well as distributor companies, were charged with the violation of the Sherman Act in combining with each other and with major distributors to effect monopolies. This language from the opinion supports the statement as to the aforesaid conclusions: "And as we have said, the course of business which involves the regular exchange of film in interstate commerce is adequate to bring the exhibitors within the reach of the Sherman Act" and "The District Court found that some of the exhibitors were co-conspirators on certain phases of the program. But we can put that circumstance to one side * * *. For it is immaterial whether the distributors technically were or were not members of the conspiracy." and "But action by a combination of exhibitors to obtain an agreement with a distributor whereby commerce with a competing exhibitor is suppressed or restrained is a conspiracy in restraint of trade and a conspiracy to monopolize a part of the trade or commerce among the States." Sustaining the action, the court necessarily held the Circuit is not in essence a single exhibitor; and that there can be concerted action between a corporation and its wholly owned subsidiaries, and the fact that defendants owned one-half or less per cent of the stock of corporations who are not parties herein does not preclude consideration of acts done by these corporate officers or by defendant's acts in connection with such corporation. Vide also: Chicago Board of Trade *v.* United States, 246 U. S. 231; Paramount Famous Lasky Corp. *v.* United States, 282 U. S. 30; Interstate Circuit *v.* United States, 306 U. S. 208; United States *v.* General Motors Corp., 121 F. (2d) 376, cert. denied 314 U. S. 618, 708.

The defendants assert that buying the only theatre in a town and building additional theatres, or buying additional theatres, or advising of intention to open another theatre, or making known the product buying ability of the chain, or buying product on better terms than a competitor, or becoming large by normal growth, causing inability of inferiorly operated theatres to get good product, or agreeing with the seller of a theatre not to compete

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within defined limits for any period of time, cutting or raising admission prices, obtaining clearances, or using so many pictures that demand for product of minor distributors is increased, does not monopolize or restrain trade or commerce among any of the several states. "We may assume that if a single exhibitor launched such a plan of economic warfare he would not run afoul of the Sherman Act." Cresent case supra. Obviously, doing any one of the aforementioned things, disassociated from any other act, would not be violative of the Sherman Act; but surely a circuit may so utilize one or more of such efforts as to illegally stifle competition or monopolize the theatre business in different locations. Motive is essential.

The defendants say that the Sherman Act prohibits only unreasonable restraint of trade and that it must affect trade or commerce between states. Apex Hosiery Co. *v.* Leader, 310 U. S. 469. There can be no question that this is a correct statement of law. The Act does not condemn monopolies as such, but prohibits monopolization or attempts to monopolize trade or commerce between the states. The verb monopolize comprehends conduct or actions. Standard Oil Co. *v.* United States, 221 U. S. 1. Through monopolization a monopoly may be secured. We are concerned here with what are claimed to be unreasonable restraints of trade. The word unreasonable as so used is broad enough to include a conspiracy in restraint of trade and monopolization of a business in restraint of trade. Unreasonable, as used in the statute, refers to a degree of restraint. Defendants further assert that the Act does not condemn restraints of trade which do not have a direct and immediate effect upon interstate commerce. The contrary of this assertion, as applicable here, is decided by the Crescent case, supra. Defendants also say that an agreement for purchase of product coupled with clearances over succeeding runs is valid, citing Standard Oil Co. *v.* United States, supra. Of course the mere agreement for the purchase of first runs and reasonable clearances is within the law; but the charge of a conspiracy contemplates a "combination of two or more persons by some concerted action to accomplish * * * an unlawful purpose" and mo-

nopolization contemplates acts to monopolize or control trade or commerce between the states to the exclusion and disadvantage of others.

The record herein includes 4728 pages of testimony and 1380 exhibits. We are here concerned with 32 different situations, each involving the testimony of various witnesses and numerous exhibits. It is not only practically impossible to set out in this opinion every phase of the testimony which has been presented, but it is unnecessary.

Many objections were raised by the defendants to the reception of evidence of inter-department communications and statements of and communications from representatives of the distributors. These objections were based, both on the ground that such were incompetent in the absence then of proof of a conspiracy, and also that there was no proof of the authority of such representatives to make the declarations or give the communications.

It is not necessary that proof of the conspiracy be made before overt acts are proved. The order of the proof lies within the discretion of the court. "There is no hard and fast rule that the evidence of concert should be first put in. • • • The order of production of evidence is one largely in the discretion of the court." Doyle *v.* United States, 169 F. 625. Among other cases supporting this view are: Eastern States Retail Lumber Ass'n *v.* United States, 234 U. S. 600; Cohen *v.* United States, 157 F. 651, cert. denied 207 U. S. 596; Paramount Pictures Inc. *v.* United Motion Picture T. O. 93 F. (2d) 714,; Glaser *v.* United States, 315 U. S. 60, cited by defendants, does not support their view.

Statements and acts of agents or representatives within the scope of their authority indubitably are admissible to show a conspiracy. Hitchman Coal & Coke Co. *v.* Mitchell, 245 U. S. 229; Erie RR. Co. *v.* Winter, 143 U. S. 60; Johnson *v.* J. H. Yost Lumber Co., 117 F. (2d) 53. Further, in conspiracy cases a great deal of latitude is permitted the court in the reception of evidence. "The rule will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact." Clune *v.* United States, 159 U. S. 590. See also: Williamson *v.*

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United States, 207 U. S. 425; Wiberg *v.* United States, 163 U. S. 32; Isenhouer *v.* United States, 256 F. 842; White *v.* United States, 80 F. (2d) 515.

There is a conflict in the testimony in many of the situations. The court recognizes the burden is cast upon the plaintiff to establish its cause and/or causes of action by a fair preponderance of the proof. It is quite patent from the nature of the charges here that they have to be established by numerous acts and transactions having relation some way to the charge. These acts must be considered together to show intent, and intent to "combine," "conspire" and/or "monopolize" must be the reasonable and natural conclusions from the acts or transactions, as believed by the court. Ordinarily proof of such acts comes from circumstantial evidence and the inferences which are ordinarily drawn from these. As was said in William Goldman Theatres, Inc. *v.* Loew's, supra: "The picture of conspiracy as a meeting of a trio of sinister persons in pointed hats close together belongs to the dark ages.," and further: "The requirement is to fit the inferential facts into the framework of the primary parts * * *." "It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, * * *." Eastern States Retail Lumber Ass'n *v.* United States, supra.

It is the opinion of this court that the defendants have violated Section 1 and Section 2, supra, of the Sherman Act, in that they have maintained an unlawful combination among themselves by means of which they have unreasonably restrained trade or commerce among the several states and have monopolized the business of operating theatres and the supplying of major films in various towns and cities, and that each of the major distributors hereinbefore named, by the methods which it has employed in its dealings with Schine and the independents, has aided and abetted these defendants in unreasonably restraining trade or commerce between the states and the "monopolization" of theatre operations.

The great film buying power of the defendant corporations gave opportunity to exert pressure on the distribu-

tors to obtain preferences. The extent of this film buying is demonstrated by the exceedingly large number of theatres controlled by "Schine" and the large amount of money which must have been paid for film rentals. The aggregate of the amount paid all distributors in total or for one season is not shown, but what the "Circuit" paid six of the major distributors, for features for a single season, does appear. This buying power included both closed and open towns. By combining the open and closed towns in Schine's deals with the distributors, Schine was enabled to dictate terms to the distributors. This ability to dictate terms was further increased by the authority of Schine to buy product for theatres not owned or operated by it. Schine acquired by purchase or lease 55 theatres from 1922 to 1931, and 80 from 1936 to 1941, inclusive, 15 in 1938 and 15 in 1939.

The means and methods employed by the different defendant corporations through their officers and authorized representatives to obtain a "monopolistic" control were numerous. Principally among these were arbitrarily depriving independents of first and second run pictures, securing unreasonable clearances, making threats to build or open closed theatres to prevent construction or operation by independents, lowering admission prices, obtaining rental concessions, restricting independents who sold to Schine as to periods and places of operation, making long time franchise agreements covering the "Circuit."

Standing out as clearly indicative of intent to "monopolize" are communications and statements made by May, Lynch, Lazar, Hensler and Insley, undisputedly authorized representatives of the defendant corporations. There are others from defendant J. Meyer Schine as well.

Some specific instances showing the predatory means used by "Schine" follow.

The Schine defendants arbitrarily deprived independents of the first run product which they had previously enjoyed in several towns. Independents were deprived of 1936-37 Columbia product at Norwalk; 1935-36 Fox product at Van Wert and Bucyrus; Loew's product for 1930-31 at Bellefontaine and for 1935-36 at Van Wert;

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Paramount's 1935-36 product at Van Wert and Bucyrus; RKO product for 1933-34 at Auburn and 1935-36 at Norwalk; of United Artists 1936-37 at Norwalk; and of Warner for 1933-34 at Norwich, 1936-37 at Norwalk, and 1941-42 at Harlan.

Independents were arbitrarily deprived of second run product which they had previously exhibited, losing 1938-39 Columbia at Rochester, Loew's 1935-36 at Van Wert and 1934-35 Warner at Watertown. After "Schine" secured the product from the independents for the aforementioned seasons, he retained it and the independent was unable to secure it in subsequent seasons. Relative to six towns including Corning, Lynch wrote on October 21, 1933, Metro: "If there are any other opposition towns where you believe you can sell a second run, I would appreciate it if you would take the matter up with me first before selling." In 1932 Lynch wrote Flynn a letter saying, among other things: "I want you to refrain from selling him (independent) any pictures whatsoever." and Metro through Flynn agreed not to do so. Lynch also wired Fox to withhold selling to this independent and wrote Fox' agent saying "have also asked him (Schmertz—Fox agent) to refrain from selling this man second run."

"Schine" was able to secure unreasonable clearances year after year in many towns. A few only need be mentioned. At Corning, New York, RKO permitted 90 to 180 days, and Fox permitted 160 days. At Seneca Falls, New York, Columbia and United Artists permitted 120 days. At Little Falls, New York, RKO, Columbia and Universal permitted 120 days and United Artists permitted 115 days. At Carthage, RKO permitted 120 days and United Artists 90. United Artists permitted 90 days at Watertown, New York, and 90 days at Amsterdam, New York; Bucyrus, Kent, Norwalk, Tiffin and Fostoria, Ohio; and Lexington and Van Wert, Kentucky.

The license contracts with "Schine" in many instances specified minimum admission prices for the various runs as well as clearance period. To an extent this affects adversely the time given the competitor. Interstate Circuit *v.* United States, supra, clearly points the reasons for condemning such provisions in a film license contract or agreement.

Schine got clearance of Herkimer over Ilion where none existed before.

"Schine" made threats to build in various towns, such as Paris, where there was a sign up, Canandaigua by a sign and newspaper article published, and where he eventually did build. In Perry, a statement by May and a newspaper article announcing that land had been bought for theatre purposes came at a time when "Schine" was trying to purchase the independent's lease. "Schine" did not build, but later got the lease. In Salamanca, just after independents acquired a site for a contemplated theatre, through the press "Schine" announced its intention to build. In Medina, "Schine" announced the making of an agreement to erect a new theatre immediately after independents started construction. In Mount Vernon, May contacted the independent to buy, saying "Schine" would build unless the deal could be put through.

Defendants' authorized agents made statements to independents which are reasonably construed as threats.

At Bellefontaine, during negotiations for the renewal of a lease with an independent, Lazar threatened to re-open the Opera House, if the independent opened the Strand.

With reference to Paris, Lazar told the independent, who was taking steps to build, that if the independent went ahead with his projects "Schine" would build a 1200 seat theatre in Lexington where the independent had a theatre and that the house would be run with 10¢ policy at all times. At Paris, Schine and an independent began construction at practically the same time. Lazar asked the independent to stop construction and see him about a deal. Subsequently Schine took over the independent's Lexington and Paris theatres under an agreement prohibiting for fifteen years the independent from engaging in the theatre business in any town in Kentucky where Schine had a theatre.

Just before Schine acquired the "Forum" theatre in Norwalk, Lazar advised an independent to "get in with us * * * we are a big company. You know what it means if you are not in with us" and further stated: "If you lease your theatre Mr. William Selman (part owner of the "Forum") will walk out of town."

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At Van Wert, the operator of the "Ohio" theatre could not get first run product it had had. During negotiations for the sale of the "Ohio" to Schine, Lazar said that Moore would have trouble getting product; Schine would have the first runs; and that Schine was interested in buying in order to raise prices.

At Lockport, during negotiations with "Schine" for the "Palace" theatre, May said it would be necessary to reopen the Hi-Art owned by "Schine" to use up "the large volume of product they had bought." This statement evidently was made to induce Reliance to sell the "Palace." In this instance it is to be noted that the independents experienced great difficulty in getting product. Hi-Art had then been closed for seven years. Metro, Fox, Universal and Loew's refused major product to the independent. Indicative of the attitude of the distributors is the letter from the Eastern Salesmanager of Loew's who wrote:

> "In our negotiations with the Schine interests it will very likely be that we will have to give them consideration for our product at Lockport, as well as other situations, and as we are hardly in a position to forego or jeopardize the business from their other situations, and for the further reason that they have for a number of years been a very representative account, we feel that our interests would be best served by giving them such consideration."

At Perry, May told the independent that "Schine" had bought a lot to build a 1000 seat theatre there. This was a town of less than 5000 population. The independent theatre building was owned by the town and leased to the independent. When May said this, a local newspaper article to the same effect was given out. Schine did not build but Herzberger sold shortly thereafter, and through the purchaser of this interest Schine acquired the lease.

Insley and May tried to buy an independent theatre at Seaford and Georgetown. Insley said it was foolish that the independent did not make a deal with "Schine" because he had recently purchased the theatre at Laurel and "Very likely, with the buying power they had they would get away

the product" from the independent. Insley said Schine had bought a lot with the intention to build a theatre in Seaford, and also said: "Well, if I were you I would sell the theatres to Schine because they are going to build a theatre there, and, naturally, they are going to get the product." Insley, under a written contract with "Schine", had authority "in negotiations for the acquisition of motion picture theatres within the above-described territory" (Delaware, Maryland, Virginia). Seaford and Georgetown are in Delaware.

At Rochester, J. Meyer Schine told independents, who were then building the "Webster", that the location was not appropriate, that it was too near the "State" (Schine's) and not justified, and Schine said he would build a theatre near the Murray theatre (owned by independents). The "State" and the "Webster" theatres were ¾ mile apart. Schine later took over the "Webster". Schine testified he said that it would not be sensible to build the "Webster", but denied that he said he would build near the "Murray."

At Seneca Falls, after an independent had taken steps toward building a theatre, a sign was placed on the Seneca theatre (shortly theretofore purchased by Schine) which read: "Closed for alterations. Will re-open soon as a Schine theatre." Independent then discontinued efforts to build. "Schine" did not re-open. Practically the same things recurred two years later. The same independent took steps to build. The sign re-appeared on the "Seneca". The independent did not go through with his plan. The "Seneca" did not open. It had not been open in several years.

After "Schine" opened a theatre within a town, it was arbitrarily able to keep the independents from opening a theatre in the town with suitable run products, as in Auburn, Lockport, Mt. Vernon, Paris and Bellefontaine.

"Schine" was able to monopolize first run product at Corbin, Medina and Lockport even though the physical facilities of the independents in those towns were better than Schine's. He was able to monopolize the first neighborhood run in Rochester even though the physical facilities of the independent were better.

The evidence discloses that "Schine" cut admission prices at Corbin, Geneva, Lexington, Malone, Ogdensburg

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and other towns; gave out cut rate tickets in Addison, good in his Corning theatre for students, and frequently engaged in two for ones and bank nights in other towns.

In cases of purchase or the assumption of leases other than those hereinbefore referred to, the agreements therefor provided for no competition by the independents for long periods of time. The non-competitive feature was also extended to cover outside towns, i. e.: Amsterdam, Ilion, Malone, Paris and Lexington.

By reason of franchise agreements entered into prior to May 19, 1942, (voided thereafter, see Decree herein of that date) permitting special film rentals not given independents, "Schine" was able to repeat benefits unavailable to independents and these were utilized against independent operators as a means of restraint. These have a definite bearing on the competitive effect of buying power. Rather than make contracts for a single year, as appears to have been Schine's practice prior to 1936, he then began making such for a period of two or three years. These contracts included both the entire circuit and also those theatres for which Schine did the booking. The great buying power of "Schine" enable him to obtain concessions not obtainable by independents. In 1936 Schine made a three year agreement with Fox, and as a result he obtained the Fox feature product in all the towns which "Schine" then operated, and this agreement was later made to include subsequently acquired theatres. In 1938 a subsequent three year agreement was made. These agreements provided for payment of certain percentage of gross receipts after deduction of operating costs, and also fixed minimum admission charges. With Loew in 1936, a four year agreement was made under substantially the same terms as made with Fox. In 1937 a comparable three year agreement was made with Warner; in 1938 a similar one with RKO; a similar two year one with Columbia in the same year and a three year agreement was made with Universal in 1939. In the instance of United Artists, a distributing corporation, separate contracts were made for each feature for all Schine theatres. Another feature of these agreements was in the inclusion of unfair and inequitable clearance provisions.

Proofs connecting the distributors with certain of the aforesaid acts of defendants come from the provisions of the franchise agreements and acts of the distributors, inter-department communications of the distributors and statements made by their authorized representatives, of which numerous ones have been set forth herein. It is hardly believable that the executive officers of the distributors did not know some of the methods employed by "Schine" in its efforts to restrict competition. Distributors' salesmen, branch managers and district managers are necessarily in constant touch with "Schine's" operations. By the very terms of the franchise agreements they insured strength against competition. These long term deals were made by each of the distributors, except United Artists whose term deals were necessarily somewhat different, and they were in effect profit sharing agreements and created a virtual partnership with "Schine." To the same end were the unreasonable clearances given "Schine" by each of the distributors. Attention has heretofore been directed to some of these. The plaintiff has submitted in connection with its brief papers purporting to be arbitration awards fixing clearances in certain instances and which arbitrations are purported to have been made pursuant to the Consent Decree entered in the District Court of the United States for the Southern District of New York on November 20, 1940. These arbitration awards are not in evidence. They have no binding effect as res adjudicata or otherwise, and this court has not considered them as evidence. However, it is hardly necessary to look to any other decision to support the view that clearances of 180 or 120 or 90 or 60 days are not reasonable in the instances herein in which they have been allowed. It is true some of these were clearances over third runs but many were over second run. In numerous instances these unreasonable clearances were allowed over towns in which Schine did not operate, and some towns distant from 10 to upwards of 20 miles, and towns in which there were no theatres. Gloversville got clearance of 45 days over Johnstown, and "Schine" was given clearance both over Newfane and Mohawk where there were no theatres. Many clearances were over outside towns of comparably small population, distant so far that

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no clearance is justified, such as Randolph, Little Valley and Ellicottville, New York. Many recently were given over towns over which there had been no previous clearance. Metro gave clearance in Ashland over Londenville and Lodi, Ohio; United Artists gave clearance in Auburn over Skaneateles, New York, and Fox in Hornell over Earlville, New York.

The record is replete with inter-department communications between major film representatives which recognize the unreasonableness of the clearances given to Schine at his demand. This is shown by the communications and representations made by Lehman of United Artists, Pielow of M.G.M., Dana and Sauber of Universal, Smith of Warner, and Sussman and Grassgreen of Fox, which are admissible in evidence because these men all held positions in their respective companies so that it was within the scope of their duties to make the representations in the communications that they did as a natural incident of the office, i. e.: branch or district manager.

Pielow, MGM resident manager, wrote: "I feel that in some of the situations (unnamed) (discussing Schine contracts), the clearance that he (Lynch) is demanding is unfair * * *." Dana, branch manager of Universal wrote the district manager that he had asked Louis Schine relative to clearances over the Smalley circuit (Norwich) and that he refused to grant the privilege of serving the pictures with shorter clearance. Universal branch manager Sauber wrote Lynch that they wanted to serve Waterloo in less time than the 30 days clearance after Seneca Falls because other majors were, but Lynch refused though Universal had the right under its contract to so do. At Rochester Scully, of Universal, said it would be satisfactory if the Madison and Monroe came within the Schine 21 day clearance.

Smith, branch manager of Warner, wrote to the Home office that Canton would do more business if it were not for Schine at Ogdensburg having 30 days clearance and if it was reduced: "It will make a better condition for us all * * *." Smith also wrote relative to Seneca Falls stating that he hoped Lynch would break down their 60 days clearance: "As I told you this morning over the phone, the clearance set up is all wet * * *."

Sussman, of Fox, wrote to Grassgreen that the 60 day clearance in Glens Falls and elsewhere seemed excessive. Sussman went on to comment that he noted that 60 day clearance was given over second run at Malone when Fox had no second run in Malone, and furthermore, as previously stated, 60 days over second run seemed excessive. Grassgreen replied that while the 60 days at Glens Falls might seem excessive, Lynch insisted upon it. Grassgreen said that Schine insisted upon the 60 day clearance because they wanted to be consistent with their demands for 60 days over subsequent independent runs.

In certain instances the distributors refused to negotiate with the independents for runs not bought by Schine. Such are seen in the refusal of RKO, Fox, Paramount, MGM and Universal to furnish second run at Auburn; of MGM at Amsterdam until the "Schine" deal did not materialize; by United Artists at Geneva; and by RKO, Universal and Fox at Paris.

In many instances the distributors refused to negotiate with the independents for runs. After "The Circuit" came into the town, in many instances it was impossible for the independent to get a good run of major product, or even to have his requests to purchase considered. RKO would not sell to the independent after "The Circuit" came in for 1933-34 in Auburn, 1935-36 in Mt. Vernon; MGM would not sell 1930-31 in Bellefontaine, 1933-34 in Lockport and Norwich, 1935-36 in Van Wert, 1936-37 in Lexington, 1938-39 in Medina; Paramount would not sell 1933-34 in Lockport, 1934-35 in Auburn, 1935-36 in Mt. Vernon; Fox would not sell 1933-34 in Norwich, 1935-36 in Amsterdam and Mt. Vernon; Universal would not sell 1933-34 in Lockport and Norwich; United Artists would not sell 1935-36 in Mt. Vernon and Van Wert; and Warner would not sell 1933-34 in Norwich, 1936-36, 1935-36 in Amsterdam, 1938-39 in Medina and 1941 in Norwich. In these instances, when the independent attempted to make application for product, he was simply advised that the product had been sold to "Schine" in a circuit deal.

Special privileges were granted, as in the option of paying a per cent of the gross receipts from product or flat

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rental, and as in deducting cost of competitive devices (bank nights, etc.) from gross before computing the distributor's share.

Special license provisions were given by tying up second runs, as in Lockport and Corning.

In certain instances Schine's film contracts called for lower minimum admission charge than those for the independent for subsequent run. This happened in Lexington and Corning.

United Artists with respect to the Capitol theatre in Ilion wrote: "We do not want to encounter any difficulty with the Schine Circuit * * *, we want to be definitely assured that the clearance as submitted in the contracts is satisfactory to the Schine Company."

Sichelman, assistant sales manager for Fox, wrote Schine that Fox was free to sell ten pictures of first run and also 100% second run in Bellefontaine and that the branch manager was being directed to sell these. In reply, Lynch said, in part: "The only product which he (independent) has been able to buy has been from independent companies. There has not been a major company that has sold him any product. * * * We are charging a top of 40¢ admission * * * and we don't want to have the distributing companies make it impossible for us to continue getting this price. * * * I have also written Mr. Schmertz advising him that we will take the remaining pictures which we did not buy first run, and, have also asked him to refrain from selling this second run house." Lynch also wrote to the Fox branch manager asking him to hold off selling the independent.

Further, Lynch wrote United Artists that "Schine" "should be allowed the privilege of playing pictures ahead of a situation (Sodus) charging a lesser admission price." To this the reply, in part, was: "Therefore, in the future, we will grant you fourteen days, or whatever clearance you see fit to take on towns like Elmira etc. in that locality." The Fox home office wrote its branch with reference to Glens Falls, second run: "I note that you have changed the clearances hereby providing for sixty days over third run Glens Falls. Sixty days clearances here and elsewhere seem

to be excessive.", and to this the branch manager replied that Schine always provided for this clearance over third run and "George Lynch insisted in carrying it through for the future."

There is much other evidence going to show the influence of "Schine" with the distributors to gain preference over independent competitors and also the cooperation of the distributors with "Schine" to the same end.

Sales managers for each of the major distributors who had authority to approve film leases, called by the defendants, gave testimony, in substance, that to their knowledge there has not been any conversations with any defendants or their executives or employees not to deal with any competing exhibitors to restrict the terms of such dealings. These sales managers can be only a small number of those employed as such during the period in question, and they speak only of their own knowledge. Some six branch and exchange managers have testified as to transactions in contradiction of the plaintiff's proof as to five of the situations in question. In Interstate Circuit *v.* United States supra, the court said that the failure to call those officers who had authority to act for the distributors and were in a position to know whether they acted in pursuance of an agreement "is itself persuasive that their testimony, if given, would have been unfavorable to appellants." While that case was stronger with respect to the proof in this connection, the defense herein as weakened both by the failure to call others of the officers authorized to act and by the nature of the testimony given by these. "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. * * * Silence then becomes evidence of the most convincing character." Interstate Circuit *v.* United States, supra.

Proof herein that these defendants conspired is shown by something more than inferences, and this together with the reasonable inferences to be drawn from the direct proof, suffices to show intent to conspire.

It is recognized that the matter of clearances is of major importance in the consideration of the issues herein. One

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position taken by the defendants is that adequate relief in so far as clearances are concerned may be had under the Consent Decree hereinbefore mentioned in United States *v.* Paramount Pictures, Inc. et al. Such Consent Decree was for a trial period of three years from the date of its entry, and it further provided that during such period the petitioner, the United States, would not seek any relief prayed in certain sections of the petition and of the amended and supplemental complaint and in certain other directions. After the expiration of said three year period, the government filed an application for modification of the decree. The defendants therein not admitting the existence of violations to which the application for modification was primarily directed, the suit as originally brought has been continued and has not yet been determined. This seeks the divorcement of theatres from the film producing companies. It is to be noted that Columbia, Universal and United Artists were not parties to the Consent Decree, and as heretofore noted the other major distributors originally parties defendant in this suit have been dropped as such. The arbitration features have continued to remain in effect since the expiration period by agreement of the parties, and so far as the record discloses there has been no arbitration under this Decree of any clearances involved herein existing at any time. We are called upon in this suit to decide whether there were any violations by these defendants of the law as laid in the complaint. Paramount et al. are not parties here. The violations herein are alleged to have occurred prior to the date of the Consent Decree. There is now no method by which either party can compel arbitration. The action taken in the adoption of the Consent Decree and the present availability of arbitration by agreement, however, do have a bearing on the extent of the judgment or decree to be made herein.

Some of the major companies are exhibitors as well as distributors. The government by the Consent Decree entered in an agreement setting up procedure purported to provide a fair and equitable sale, distribution and showing of pictures to all distributors. Just what was accomplished by the Decree, other than some arbitration of

clearances, does not appear. The government in entering into the Consent Decree evidently contemplated that such decree would obviate the necessity of a trial of the issues and intended to let by-gones be by-gones. As compared with some of the major distributors, these defendants when combined are relatively small. The Consent Decree, therefore, brings up the question of whether the harsh determination of dissolution as urged by the government should be compelled or whether some adjustment or reorganization can be agreed on or fixed by the court which will as definitely as possible prevent future violations.

The motion picture business in production, distribution and exhibition has come to be a leading industry in this country. The producer-distributors and chains of exhibitors occupy positions from which "monopolization" is easily brought about. Each have lawful advantages which are sufficiently remunerative. The public, as well as the individual independent exhibitor, has an interest in fair competition, and it is entitled to have exhibitions at reasonable prices, well selected products and reasonable clearances between available theatres. A theatre owner naturally seeks to furnish those pictures which attract the greatest revenue. The record does not disclose any different attitude on the part of "Schine". The record does not disclose that it has not furnished sufficiently attractive entertainment. Fair competition should benefit the public, but "monopolization" when exercised by a strong wide reaching organization or group of affiliated organizations crushes or weakens opposition, eliminates fair competition to the disadvantage of the public and the individual competitor.

The defendants have maintained an unlawful combination among themselves and with their affiliated corporations and have monopolized the licensing of the exhibition of motion picture films in various cities and towns in violation of the aforesaid sections of the Sherman Act and, through the unlawful combination between themselves and their affiliates by their predatory practices, have monopolized the business of operating motion picture theatres in various towns and have attempted to monopolize in various other towns; and the defendants have contracted, conspired and combined with each other and their affiliated

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corporations and with each of the aforesaid major film corporations for the purpose, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of said film corporations in various towns and cities, in violation of aforesaid statute.

The plaintiff is entitled to a judgment enjoining the defendants:

(1) from monopalizing the supply of major first run films in any situation where there is a competing theatre suitable for first run exhibition thereof, and from monopolizing the supply of second run films in any situation where there is a suitable theatre for second run exhibitions thereof;

(2) from demanding or receiving clearance over theatres operated by others which unreasonably restrict their ability to compete with a theatre owned or operated by a defendant, or corporation controlled by it;

(3) from conditioning the licensing of films in any competitive situation, outside of Buffalo, New York, upon the licensing of films in any other situation;

(4) from selling or acquiring any theatre interests pending the further order of this Court;

(5) from enforcing any existing agreements heretofore entered into by the defendants not to compete, or to restrict the use of any real estate to non-theatrical purposes; from the use of any threats or deception as a means whereby a competitor is induced to sell;

(6) from continuing the heretofore described "conspiracy" or "monopolization" in restraint of trade and commerce between the states and the entering into any combination or conspiracy for the purpose or with the effect of restraining trade and commerce between the states;

(7) and directing the entering of a decree adjudging that the defendants and their affiiliated corporations be dissolved, re-aligned or reorganized in their ownership and control, so that fair competition between them and other theatres be restored and hereafter maintained; and that the determination of the question of the dissolution, re-align-

ment of reorganization of the parties aforesaid and the method to be employed in the accomplishment of the same be left to be fixed by this court after further consideration with the parties.

As to the objections of the defendants that certain testimony is hearsay, it is to be said this was received in evidence on the explicit statement of the attorneys for the government that the authority to make the statements and write the communications would be shown. The Court reserved the right to strike out in default of making of such connections. This connection has not been made in certain instances, and the court is attaching and submitting herewith a statement of its action with respect thereto. However, it is believed that the exclusion or inclusion of this testimony does not affect the decision on the issues.

In the instant case voluminous records of the distributors were received in evidence on stipulation of the parties. These, among others, included many agreements made by the distributors with the defendants and others. Various interdepartment communications to which objections were made were properly received as a part of the record of the distributors, and further many of them were made by officials acting in their ordinary and usual capacity as representatives of the distributors. Acceptance of this type of evidence is supported by many authorities. Murray *v.* United States, 10 F. (2d) 409, cert. denied 271 U. S. 673; Lewis *v.* United States, 38 F. (2d) 406; Johnson *v.* J. H. Yost Lumber Co., 117 F. (2d) 53; Patterson *v.* United States, 222 F. 599, cert. denied 238 U. S. 635; United States *v.* Corn Products Refining Co., 234 F. 964; Hartford Empire Co. *v.* United States, 323 U. S. 386.

The parties herein have heretofore submitted lengthy proposed Findings of Fact and Conclusions of Law. It seems that it would simplify matters if, in the light of this opinion, new Findings were submitted. This seems specially advisable because of the numerous situations involved in the suit. However, this matter will be left to the desires of counsel.

October 8, 1945.

(Sgd.) JOHN KNIGHT,
United States District Judge.

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Acting upon the objections made by defendants, the following are stricken from the record:

Testimony by Long (R 127) that Granger, Fox general sales manager, told him that Fox could not afford to give up $50,000 worth of business in order to get $5,000.

Testimony by Dasher (R 352-353) that MGM branch manager Drew told him, "Schine has 60 theatres, you have got one. What do you expect us to do."

Testimony by Cohen (R 3201) that Seed, Warner exchange manager, told him that Schine would pay $25.00 more if Warner did not sell the independent.

Testimony by De Toto (R 808-809) as to what Lehman said Schine was going to do in relation to opening additional theatres.

Testimony by Moore (R 383-384) as to what "Schine" asked that Metro hold (product) for them.

Testimony by Ayres (R 2963-2970) relative to the showing of Metro picture "Gone With The Wind".

Testimony by Warner (R 2350-2355) relative to his being called before the Film Board of Trade by a representative of RKO for a violation of the National Recovery Act in selling "two for one" tickets.

While we have generally held in favor of inter-office communications or memoranda, certain of them are hearsay and are stricken out:

In exhibit 370; "Lynch claims that he does not want a second run policy to prevail at the second run opposition and has promises from other major companies that they will not sell second run" is stricken.

Exhibit 456 refers in part to the fact that the independent told the local branch manager that he might be forced to charge 10¢ balcony and 15¢ main floor at night in order to meet his competition, and that is stricken.

The part of exhibit 519 which refers to the opinion of the branch manager that conditions were "chaotic" is not evidence against "Schine".

Exhibits 163, 229, 542, 546 and 554 are not stricken but are strictly construed. We believe them to be within the authority of the distributor's agent to make such statements, being incident to their scope of authority.

Objection was frequently made to the testimony by the independent that when he requested product of the exhibitor, he was told that it had been sold to "Schine". It is not felt that this is hearsay or beyond the scope of authority of the branch or district manager, or of the salesman. He knew that it was sold, and to whom. The statement that it was sold is admissible, and it is also admissible to state to whom it had been sold.

JOHN KNIGHT,
U.S.D.J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 571 ~~572~~

SCHINE CHAIN THEATRES, INC., *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF IN OPPOSITION TO MOTION BY APPELLEE TO DISMISS OR AFFIRM

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OCTOBER TERM, 1946

SCHINE CHAIN THEATRES, INC., *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

No. ——

BRIEF IN OPPOSITION TO MOTION BY APPELLEE TO DISMISS OR AFFIRM

The appellee, the plaintiff in the District Court, has filed in the District Court a statement opposing the jurisdiction of the Supreme Court and has combined with that statement a motion to dismiss or affirm. (Although the statement filed contains no motion in terms, the motion can probably be spelled out from the use of the word "motion" in the caption and the last paragraph of that portion of the statement which is designated "argument".)

The relief sought by the appellee is either

1. That the appeal be dismissed as pre-mature; or
2. That the appeal be dismissed as to Section III of the judgment and the judgment affirmed as to Section II thereof; or
3. That the hearing of the argument upon our appeal be postponed until an appeal or appeals from a further judgment which the appellee expects the District Court to enter.

The contention advanced by the appellee that this case involves an appeal from only Sections II and III of the amended judgment is obviously erroneous. The appeal is taken from the entire judgment, particularly including Section I which constitutes the very foundation upon which the entire judgment must stand or fall. Without the holding under Section I that the appellants have conspired and combined to violate and have violated the Sherman Act there would be no basis whatsoever for the remaining provisions of the judgment. The second to thirty-sixth assignments of error are addressed solely and directly to Section I of the judgment.

It is accordingly difficult to understand appellee's attempt to deal piece-meal with Sections II and III of the judgment. Were this court to grant the second alternative prayer, and subsequently decide in favor of the appellants on their appeal as to Sections I and IV, it would leave Sections II and III of the judgment hanging in the air, unsupported by any holding that the Sherman Act had been violated and therefore wholly without any force or effect.

The historical account in appellee's statement regarding proceedings after the original judgment is not a part of the record before this court at this time. The fact that the original judgment contained a provision for the filing of plans and objections thereto is wholly meaningless in view of the fact that when the amended judgment from which this appeal is taken was entered, all references to the submission of plans was eliminated upon the initiative of the appellee. If this amended judgment is not a final judgment from which an appeal may be taken to the Supreme Court the plaintiff in the District Court could continue indefinitely the injunctive provisions of Section II of the judg-

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ment simply by taking no steps to procure the approval of a plan such as appellee claims to be necessary to render Section III of the judgment appealable.

Similarly, the Consent Order referred to under the caption "Argument" is no part of the record before this court on this motion and in fact any reference thereto, either now or at any time during the pendency of this appeal, for the purpose of prejudicing in any way the appeal, is highly improper. The order was a temporary expedient resorted to to avoid trying the case shortly after the start of World War II and by its terms was not to be used against the consenting defendants for any purpose whatsoever other than as expressly provided in the order. This order expired by limitation of time on November 15, 1944 and has been of no force or effect since then.

The appellant maintains that the judgment appealed from is a final judgment and that the appeal presents for review substantial questions, consideration of which is not foreclosed by the recent decision in *U. S.* v. *Crescent Amusements,* 323 U. S. 173.

POINT I.

The judgment appealed from is a final judgment.

The judgment appealed from consists of four parts. The first part decrees that defendants have violated the Anti-Trust Laws. The second portion grants sweeping injunctive relief. No one could deny the finality of the judgment had it stopped there. Certainly there is nothing in the third section of the judgment which justifies any contention that the judgment was not final. It is interesting to observe that appellee says of this section of the

judgment that it is "in a form so abstract that it requires no action or inaction of any kind on the part of any defendant". If that be indeed a true description of this portion of the judgment, which was signed by the District Judge in the very words drafted by appellee, then it was improper to include any such provision in the judgment. It is the function of an equity decree to advise defendant what he must do, since he could be punished for contempt of court for failure to comply. A provision which is vague is improper and will be stricken out on appeal.

> "The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt' * * *" *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, at 410 (also cases there cited in foot notes 7 and 8.)

Appellee argues, altho examination of the judgment itself shows just the contrary, that this judgment is on its face merely preparatory to the entry of a further order granting relief in concrete terms and contends that such an order is not appealable until the further order has been entered, citing *Green* v. *Fisk*, 103 U. S. 518 and *Keystone Iron Co.* v. *Martin*, 132 U. S. 91.

Neither of these cases has any bearing upon the situation here. The *Green* case was a partition action where the Court below had adjudged each of the appellees to be the owner of one-eighth of the property and had referred the matter to a master to proceed to a partition. Obviously this was not a final decree, but the actual ground of dismissal was the fact, as stated in the opinion, that even if it had been a final decree, the court "would be without jurisdiction because the property only has been adjudged to the appellees, and the value of that is less than the amount required to bring a case here."

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The nature of the *Keystone* case is best indicated by the head note to the case in Book 33 of the Lawyers' Edition, reading as follows:

> "The decree is not final and is not appealable where the action is for an injunction restraining defendant from committing further trespasses on the mineral and ore in land or removing the same and for an account of the quantity and value of the ore taken from the land by the defendant, and the decree grants the injunction, and orders an accounting, *but the account remains to be taken.*" (Italics ours)

More to the point is the recent decision of this Court in *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, where the Court following the cases of *Forgay* v. *Conrad,* 6 How. (U. S.) 201 and *Carondelet Canal Co.* v. *Louisiana,* 233 U. S. 362, held that where the decree appealed from directed the immediate delivery of physical property it is reviewable by the Supreme Court even though the same judgment also ordered an accounting. (See also *Knox Loan Assn.* v. *Phillips,* 300 U. S. 194, 197 and *Korematsu* v. *United States,* 319 U. S. 432, 435.)

In the instant case the judgment appealed from on its face calls for no further present judicial action, not even an accounting such as was ordered in the cases just cited. The judgment (a) decreed that the defendants had violated the Sherman Act (Section I of the Judgment) and (b) provided remedies against future violations (Sections II and III of the Judgment). Later judicial action would be appropriate only if the government were to contend that the defendants were not complying with the judgment (*United States* v. *Pullman Co.,* 53 F. Supp. 908) and in

such event the action would be taken, not under Section III but under Section IV. Moreover, such further judicial action would have to be based upon a new record starting with an application by the government containing appropriate allegations of fact. These appellants would thereupon have an opportunity to controvert such allegations. Presumably a hearing would be held at which testimony would be taken, as in any other case where it is claimed that a defendant has failed to obey the direction of an equity judgment. The issues raised on the appeal which might be taken from the direction then made by the court would be entirely different from the issues to be raised on the pending appeal.

The pending appeal raises two basic issues: (1) Was the court correct in determining that defendants had violated the Sherman Act, and (2) if the first point be resolved against the appellants, is the relief granted proper? The mere statement by the government that it knows of no case in which a Sherman Act defendant has sought to appeal from a "judgment of divestiture" pending adoption of a plan to put it into effect has no weight here. In the first place it is improper to characterize the judgment here as a "judgment of divestiture". The appellee has consistently contended that this case is on all fours with *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, and yet no question was ever raised in that case, but that the judgment of the District Court was a final and appealable judgment without awaiting any further action on the part of the District Court looking toward the formulation of a plan. Obviously in cases where the original judgment in terms provides for the submission and approval of a plan or plans, there may be some logic in arguing that the appeal should

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await the adoption by the District Court of a plan. It was for this reason, among others, that the appellants made no effort to procure the allowance of the appeal which they filed on December 28, 1945, pending the determination of their motion to amend the findings. However, after determination of that motion the Court signed a judgment which had been physically prepared by the appellee which judgment eliminated, at the instance of appellee, any provision for the submission or approval of a plan. It can not now be argued that this judgment is not final and appealable because a former order in the case contained reference to the preparation of a plan.

POINT II.

Section II of the judgment cannot be separately affirmed.

The suggestion by the appellee that Section II of the judgment should be dealt with separately from the remainder of the judgment and, as such, affirmed is, while entirely novel, wholly without merit. Section II relates only to the injunctions to which the appellants are to be subjected if the Court below is sustained in its holdings resulting in Section I. No part of the judgment can be sustained unless this court holds that the court below was correct in finding that the appellants have violated the Sherman Act. This can not be determined from an inspection of the opinion and findings of Judge Knight all of which are challenged by this appeal on the ground that they are not supported by the evidence. Nor can it be determined by comparison of these findings, with the findings in the *Crescent* case which are not before the court at this

time. A determination of the merits of this appeal can be arrived at only after a careful examination of the entire record in this case, and full opportunity for argument.

POINT III.

The appellee's request for a postponement of the argument of this appeal is improper on this motion.

It is a sufficient answer to the third alternative suggested by the appellee that there is no provision either under paragraphs 3 or 4 of Rule 7 or paragraph 3 of Rule 12 for the entertainment by the Court on this motion of an application for a postponement of the argument of the appeal. The Court should therefore decline to consider this request by the appellee at this time.

Appellee's motion should be in all respects denied.

Respectfully submitted

WILLARD S. MCKAY,
Attorney for Appellants.

ARTHUR GARFIELD HAYS,
SEYMOUR M. HEILBRON,
of Counsel.

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SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 571

SCHINE CHAIN THEATRES, INC., ET AL.,
Appellants

vs.

UNITED STATES OF AMERICA

SUPPLEMENT TO JURISDICTIONAL STATEMENT

Pursuant to the direction of this Court, the appellants Schine Chain Theatres Inc., et al., hereby supplement the Jurisdictional Statement, dated April 15, 1946 heretofore filed by them in this case by adding to said Jurisdictional Statement the following:

The grounds upon which it is contended that the questions involved herein are substantial are as follows:

(1) The original judgment dated November 1, 1945, and the amended judgment dated March 29, 1946, determining that defendants have violated Sections 1 and 2 of the Sherman Act and that they should be enjoined and compelled to submit to dissolution, realignment and reorganization as set forth in said judgments were not warranted by the evidence or by the law, but were contrary to the evidence and the law applicable thereto.

(2) The amended findings of fact made by the District Court in support of said judgments were for the most part erroneous and were not warranted by the evidence and were

contrary thereto, and in any event did not in fact support the conclusions of law and the amended judgment.

(3) The District Court erred in the admission of evidence which should have been excluded and without which it would not in any event have been able to arrive at the decision appealed from.

In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, p. 184, this court refused to pass upon admissibility of evidence because it held the judgment to be sufficiently supported by other evidence. In the instant case the judgment is supported neither by the admissible nor the inadmissible evidence.

(4) The District Court arrived at its decision by making assumptions concerning what the defendants could have done or might have done and not upon the facts adduced concerning what actually transpired. In so doing the District Court substituted assumptions and suspicions, drawing unfavorable, sinister, strained and unnatural inferences from circumstances which in fact showed wholly legal and proper conduct on the part of the defendants. Said inferences and assumptions were contrary to positive and direct testimony of witnesses. The court fell into the error of accepting theories advanced by the plaintiff which said plaintiff was unable to support by direct testimony, the inability of the plaintiff to furnish said direct testimony being indicated by its admissions contained in the bills of particulars and answers to interrogatories filed by said plaintiff.

(5) The findings of fact as made by the District Court were in some instances clearly contrary to uncontradicted evidence, or not supported by any competent evidence, all as more fully stated in the Assignments of Error (dated August 26, 1946, Case No. 572) Assignment Nos. One hundred twenty third to One hundred thirtieth, inclusive. The said findings of fact consist of no more than the separation made by the plaintiff's counsel into separate so-called "Find-

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ings" of various sentences contained in the opinion of the court without any attempt to segregate findings of fact from conclusions of law. Said opinion, in turn, in so far as it purported to deal with the evidence, was for the most part a paraphrase of plaintiff's brief, without giving any consideration whatsoever to the evidence submitted by the defendants, or correlated in their brief, or to the request to find submitted by the defendants.

(6) The decision of the District Court was strongly influenced by and depended upon testimony, oral and written, erroneously admitted by the Court over the objections of defendants' counsel, and retained in the record despite motions by defendants' counsel to strike, which should have been granted. This evidence consisted of exhibits listed in the Assignment of Errors, together with oral testimony and admitted over defendants' objection. This vice is particularly noticeable in the decision and findings with respect to alleged unreasonable clearance which the Court arrived at without having had before it any evidence whatsoever from any competent or authoritative source as to what factors determine reasonableness or unreasonableness of clearance, and whether all or any of these factors were or were not present in each instance where the Court held clearance to be unreasonable.

(7) The District Court erred in refusing findings proposed by the defendants and amendments to the original judgment proposed by defendants although each of these was required by the evidence before the court. The respects in which the court erred are particularized in Assignments of Error, dated August 26, 1946, Case No. 572, Assignments Nos. One Hundred Thirty-first to Two Hundred Fifth, inclusive.

(8) The Findings by the District Court of discriminatory conduct by the distributors against "independent exhibitors" and in favor of the defendants are wholly unwarranted by

the evidence and should, in any event, be disregarded by the Supreme Court because they are based, for the most part, on incompetent evidence consisting of interoffice memoranda and communications from one employee of a distributor to another employee of the same distributor, and not in any way binding upon the defendants; and upon hearsay evidence as to conversations between witnesses called by the plaintiff and irresponsible employees of non-defendant distributors not produced by the plaintiff as witnesses. Furthermore, any discrimination actually existing in favor of the defendants was, in the light of the uncontradicted evidence of responsible executives of the distributors, wholly justified for good and valid reasons as good business practice between the respective distributors and the defendants as good customers of said distributors. The attempt by way of injunction to eliminate certain practices alleged to be employed by the defendants to procure undue favorable treatment from the distributors would not have the effect of carrying out the provisions of the Sherman Act, but on the contrary would reduce the defendants to a position where the distributors who were originally defendants in this case, and against whom injunctive relief was originally prayed for, would be aggrandized and put in an unduly favorable bargaining position at the expense of the defendants.

(9) The admitted action of the District Court in drawing inferences unfavorable to the defendants by reason of their failure to call more than a limited number of employees and executives of the distributors, is wholly improper and erroneous in view of the fact that the plaintiff by dismissing the said distributors as defendants in the case had relieved said distributors from the necessity of appearing to contravene the plaintiff's allegation. Such inference is shown to all the more unfair and unwarranted by reason of the failure of the Court to draw inferences unfavorable to the plaintiff from its failure to call more than a small percentage of the prospective witnesses named by it in its bills of particulars, and answers to interrogatories, or to deal with more than a small

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number of the situations listed in said pleadings. The Court should have inferred from such failure that the testimony of these named persons would have been unfavorable to the plaintiff and favorable to the defendants, and that the evidence adduced in such named situations would have been unfavorable to the plaintiff and favorable to the defendants.

(10) The various practices enjoined by the District Court were so enjoined without any indication or evidence that they were in fact improperly or illegally employed by the defendants with the purpose, intent, effect or result of restraining or monopolizing interstate trade and commerce in contravention of the Sherman Act, and said enjoined practices are made to appear illegal only by the use by the Court in describing the same, of Conclusions of Law wholly unwarranted by the evidence. Furthermore, the injunctive provisions are entirely too general, indefinite and extensive. The court went so far as to enjoin the sale of any properties by the defendant when no such relief had been in any way indicated either in the pleadings or upon the trial.

(11) In view of the express finding by the District Court (No. 30 of the Amended Findings of Fact) that there was no evidence of any violation of the Anti-Trust Laws by the defendants since May 19, 1942, a date two years prior to the start of the trial of this case, and forty one months prior to the entry of the original judgment, the Court was not justified or warranted in granting either injunctive relief or divestiture without some showing that violation of the Anti-Trust Laws was threatened or reasonably to be apprehended.

(12) The divestiture provisions contained in the judgment and amended judgment are punitive rather than remedial. They are admittedly harsh and are not warranted or justified by the facts in this case, nor by any evidence that such provisions would have any tendency whatsoever to correct any of the evils, or supposed evils, claimed to have

existed in the motion picture business. The only effect of these provisions would be severely to punish the defendants by inflicting severe financial loss on them, without in any way benefiting the public.

(13) The Findings of the District Court regarding conspiracy by the defendants between themselves, necessarily and admittedly required the Court to hold that these corporate defendants were not in essence a single unit, since the Court conceded in its opinion that (quoting from *United States* against *Crescent, supra*), "we may assume that if a single exhibitor launched such a plan of economic warfare that he would not run afoul of the Sherman Act." The evidence before the Court, as contained in the defendants' answers to interrogatories showed that the Schine Chain Theatres, Inc. was a one hundred per cent. owner of the other corporate defendants and that for the most part the actual owners and operators of the theatres involved were subsidiaries of the defendant, Schine Chain Theatres, Inc., many of whom were not named as defendant in this case. Without a finding by the Court that the corporate defendants were in essence a single exhibitor, and thus not "running afoul of the Sherman Act", it would necessarily follow that the Court did not at any time during the course of this litigation have before it all of the parties necessary to enforce its divestiture orders.

(14) The record is completely devoid of evidence of any motive on the part of defendants illegally to stifle competition or to monopolize the theatre business in any locality. (*cf.* Opinion of John Knight U. S. D. J. Appendix to Jurisdictional Statement Case No. 571 p. 11, "Motive is essential.")

(15) The District Court should have granted defendants' motion to strike all that part of the amended complaint dealing with the operation of theatres located in the State of New York and operated in the State of New York, since the opera-

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tion of said theatres did not involve interstate commerce. (*United Artists* v. *Taylor*, 273 N. Y. 334)

(16) The plaintiff failed to prove the allegations of the complaint as amended and modified by plaintiff's bills of particulars.

(17) The individual defendants contend that in addition to all of the foregoing points and considerations, the evidence failed to show any participation whatsoever, on the part of them or any of them, in any conspiracy or combination to violate the Anti-Trust Laws in any respect whatever, and that in all events the complaint should have been dismissed as against each of said individual defendants.

The substantial issues raised by this appeal were not determined by this Court in *U. S.* v. *Crescent Amusement Co., supra* or in any other case. Among other things, the evidence presented in that case differed substantially from the evidence presented to the District Court in the instant case. This fact, of course, can be demonstrated only by a review of the entire record in this case. Although the Government followed practically the same pattern in its charges in the instant case as in the Crescent case, it failed to prove in this case, the facts upon which the decision in the Crescent case rested.

Since the decision of the District Court in this case, there have been decisions in the Southern District of New York, and the Western District of Oklahoma, as follows: By the Statutory Court in the Southern District of New York, in *U. S.* v. *Paramount Pictures, et al.*, 66 F. Supp. 323; and in the Western District of Oklahoma, *U. S.* v. *Griffith Amusement Co., et al.*, No. 172 Civil, (opinion filed October 9, 1946, as yet unreported but printed in full as an appendix hereto.)

In discussing the provisions to be contained in the decree in *U. S.* v. *Paramount, supra*, and the refusal of the Statutory Court to decree dissolution, divorcement or divestiture, the

Special Assistant to the Attorney General, who was also the trial counsel in the instant case, stated to the Statutory Court (s. m. pp. 4195, 4196) as follows:

> "The monopoly positions that are involved here are, of course, infinitely more significant in terms of industry control than any of those little situations that were involved in the Schine case, and I submit that the kind of relief that is being proposed here is less drastic, if you compare the scale of the violations and the scale of defendant's operations, than the kind of relief to which both Schine and Crescent have been subjected."

In *U. S.* v. *Griffith Amusement Co., et. al.,* the Court dismissed the complaint and distinguished the case from *U. S.* v. *Crescent* and the instant case (appendix pp. 34, 35) by stating in effect that while the charges in the three cases were similar, the plaintiff had proved its case in *U. S.* v. *Crescent* and in this case but had failed to prove its case in *U. S.* v. *Griffith.* The appellants contend that a review of the record will show that the plaintiff failed to sustain its charges in this case by a fair preponderance of the evidence, and that on the evidence in this case the District Court should likewise have dismissed the complaint.

The amended judgment here sought to be reviewed was entered herein on March 29, 1946. This appeal was allowed by order dated and filed on April 17, 1946.

Respectfully submitted,

WILLARD S. McKAY,
Counsel for Appellants

November 27, 1946.

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 572

SCHINE CHAIN THEATRES, INC., ET AL.,
Appellants

vs.

UNITED STATES OF AMERICA

SUPPLEMENT TO JURISDICTIONAL STATEMENT

Pursuant to the direction of this Court, the appellants Schine Chain Theatres, Inc., et al., hereby supplement the Jurisdictional Statement heretofore filed by them in this case by adding to said Jurisdictional Statement the following:

The grounds upon which it is contended that the questions involved herein are substantial are:

(1) All of the grounds set forth in the supplement to Jurisdictional Statement filed concurrently herewith in Case No. 571.

(2) The order and judgment entered herein on July 5, 1946 and designated "Order Setting Forth Plan Effectuating Judgment" which is here sought to be reviewed was not based upon any new findings of fact or conclusions of law other than those originally claimed to support the amended judgment entered March 29, 1946 (See Grounds 1 and 2, Case 571).

(3) The order and judgment of the District Court entered July 5, 1946 was improper and without force or effect because the District Court at the time of the making thereof was without jurisdiction. A final judgment had already been entered on November 1, 1945 and this judgment had been amended on May 29, 1946. An appeal to this court had been taken by the defendants and allowed by the court on April 17, 1946 and the citation had been issued and served upon the plaintiff. Consequently, the District Court no longer had jurisdiction to vary the judgment until the determination of the appeal by this court.

In *Berman* v. *U. S.*, 302 U. S. 211, Mr. Chief Justice Hughes said at page 214:

> "As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner. *Draper* v. *Davis*, 102 U. S. 370, 371; *Keyser* v. *Farr*, 105 U. S. 265, 266; *Spirou* v. *United States*, 24 F. (2d) 796, 797; *United States* v. *Radice*, 40 F. (2d) 445, 446; *United States* v. *Habib*, 72 F. (2d) 271".

That an appeal is perfected within the meaning of this general statement when the Citation has been issued and filed with this Court even though the record may not have been docketed is clear from *U. S.* v. *Habib*, 72 F. (2d) 271. The Circuit Court of Appeals for the Second Circuit held that it was beyond the power of the District Court to modify a sentence under such circumstances. (See also *U. S.* v. *Aluminum Company of America*, 2 FRD 224 at 236 and *Petition of Pahlberg*, 2 FRD 533; *Spirou* v. *U. S.*, 24 F. (2d) 796.)

(4) The order and judgment of the District Court entered July 5, 1946 was improper and without force or effect for the further reasons that; (a) such order was entered by the District Court without having specially found the facts and without having separately stated its conclusions of law

thereon supporting the entry of such order as required by Rule 52 (a) of the Rules of Civil Procedure and (b) it directed a divestiture of the properties described therein in a manner which would constitute a deprivation of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

(5) The order and judgment of the District Court entered July 5, 1946 was improperly and prematurely made and entered because it was entered for the avowed purpose of effectuating Section 3 of the amended judgment herein (a) without allowing the appellants an adequate opportunity or any opportunity at all to comply with said section, or (b) because it was entered without any evidence or finding that such order was in any way necessary to effect said Section 3; (c) because the divestiture of the theatre interest described therein and the appointment of a trustee for such purpose was not warranted by any findings of fact in this case or by the evidence and was contrary thereto; (d) because said order was made and entered directing the sale of the theatre interest described therein by a trustee without allowing the appellants an opportunity for a reasonable time to sell said interests without the intervention of a trustee in the absence of any showing that the appellants would be either unwilling or unable to make such sale, and (e) because it approved a plan of dissolution proposed by the plaintiff and designated by it as a plan of reorganization without having before it any evidence as to the propriety of such plan.

(6) The District Court's Divestiture Order of July 5, 1946, was unscientific, illogical, punitive, rather than remedial, in its purpose and effect. It was without any precedent in law, and not based upon any evidence or findings showing the necessity therefor, or that it would have any tendency whatever to correct the alleged evils in the motion picture business, or create, maintain or restore competition in the motion picture industry, or that it would

benefit the public, or that it would have any effect whatsoever except to penalize and punish the defendants by inflicting severe financial loss without corresponding benefit to the public.

(7) All other considerations aside, the plans of realignment submitted by the defendants should not have been rejected by the District Court in favor of divestiture without having taken any evidence with respect to their probable efficacy, or without giving any consideration to the proven efficacy, up to the date of trial, of the injunctive provisions of the temporary order, dated May 19, 1942, or to the probable effect upon the motion picture business generally of the decision of the District Court of the Southern District of New York in *United States* v. *Paramount Pictures, et al.*, 66 F. Supp. 323 (which decision, although not binding upon the Court was before the Court in connection with the defendants' motion for a stay, dated June 7, 1946), all as more particularly set forth in Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth and Nineteenth Assignments of Error. (Defendant's Assignment of Errors, dated Aug. 26, 1946).

(8) In ordering the sale within six months of the properties referred to in paragraph I-E of its Divestiture Order, the District Court went outside of the testimony in the case and ordered the sale of said properties, for no reason except for the fact that on May 19, 1942, the defendants had voluntarily agreed to endeavor to sell said properties but had been unable to do so prior to the expiration date of the order of May 19, 1942, as extended, and in the face of the further fact that with respect to the Strand Theatre, Cumberland, Maryland, the defendants had been relieved by the Court from making any further efforts to sell said property.

(9) As a corollary to Ground 13 in Case No. 571, there is nothing to show that the District Court at any time had before it the parties whose compliance would be necessary to

enforce the sale of the theatre properties referred to in the Divestiture Order.

Minnesota v. *Northern Securities Co.*, 184 U. S. 199.

(10) In making an Order that the theatre properties of the defendants in certain named localities should be sold by a trustee, the District Court acted as to certain properties without any evidence whatsoever with respect thereto, and as to certain other properties without any evidence showing, or tending to show, that the acquisition by the defendants of their theatre interests in said localities and/or the maintenance and use by the defendants of such theatre interests was, or is, the result of, or pursuant to, or has resulted in any conduct on the part of the defendants or any of them in violation of Sections 1 and 2 of the Sherman Act, or that the divestiture thereof, or of any part thereof, is otherwise warranted by Sections 1 and 2 of the Sherman Act. The errors of the Court in this respect are more particularly set forth in the Twenty-fourth to the Sixty-third assignments of error, inclusive.

(11) There is no reason whatever for including the individual defendants in the Divestiture Order, yet the Court addressed its said order to all of the defendants, including the individual defendants.

The substantial issues raised by this appeal were not determined by this Court in *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, or in any other case, for the reasons cited in the Supplement to Jurisdictional Statement in Case No. 571, pages 7 and 8, and for the further reason that the Order and Judgment appealed from provides for a type of divestiture for which the appellants claim there is no precedent.

The Order and Judgment here sought to be reviewed was entered of record on July 5, 1946.

The petition for appeal herein was presented and filed and the order allowing said appeal signed and entered on August 26, 1946.

Respectfully submitted,

WILLARD S. McKAY,
Counsel for Appellants.

November 27, 1946.

APPENDIX

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, *Plaintiff,* v. GRIFFITH AMUSEMENT COMPANY, *et al.*, *Defendants.*	No. 172-Civil

OPINION

On April 28, 1939, the United States of America filed its complaint against the defendants Griffith Amusement Company, Consolidated Theatres, Inc., R. E. Griffith Theatres, Inc., Westex Theatres, Inc., L. C. Griffith, H. J. Griffith, R. E. Griffith, Paramount Pictures, Inc., Metro-Goldwyn-Mayer Distributing Corporation of Texas, Loew's Incorporated, RKO Radio Pictures, Inc., Vitagraph, Inc., Universal Film Exchanges, Inc., Twentieth Century-Fox Film Corporation, Twentieth Century-Fox Film Corporation of Texas, United Artists Corporation, and Columbia Pictures Corporation, alleging violations of Sections 1 and 2 of Title 15 U. S. C. A., the Sherman Anti-Trust Act, and seeking relief under Section 4 thereof. Prior to the trial of the cause, the action was dismissed as to all of the defendants except Griffith Amusement Company, Consolidated Theatres, Inc., R. E. Griffith Theatres, Inc., Westex Theatres, Inc., L. C. Griffith, H. J. Griffith and R. E. Griffith. Defendant R. E. Griffith died in 1943 and the action was not revived against his personal representative or his estate.

On motion of the plaintiff, paragraphs 44 to 48, inclusive, were stricken from the complaint leaving paragraphs 39, 40, 41, 42, 43, 49 and 50, which charge violations of the Sherman Anti-Trust Act. All of the defendants remaining in the case are what are known in the moving picture industry as exhibitors. The alleged violations follow:

> "39. For the past five years the defendant exhibitors have *continuously combined with each other and with each of the defendant distributors to unreasonably restrain interstate trade* and *commerce* in motion picture films and to *monopolize* and *attempt to monopolize* the *first* and *second run exhibition of feature pictures* and the *operation* of *first and second run theatres* in the Griffith Towns in violation of Sections 1 and 2 of the Sherman Act, in the following manner:
>
> "40. Said exhibitors have *refrained* from *competing with* each other in the *acquisition* and *operation* of motion picture theatres in said towns pursuant to *express or implied* agreements to allocate said territory between them.
>
> "41. During each of the past five years said exhibitors have *collectively contracted* with each of the *defendant distributors* for all of the feature pictures annually *required for exhibition* at all of the theatres operated by them in said towns, in *advance* of the *production* and *distribution* of such feature pictures and *before* such feature pictures or any of them, have been *offered* to any *other* exhibitor in said towns, with the *purpose* and *effect* of *controlling* and *monopolizing* the *supply* of feature pictures available for exhibition in said towns.
>
> "42. By said contracts said exhibitors have *combined* with each other to *compel each of the defendant distributors* to *grant* to all of them in all of said towns the following *exclusive privileges* during the entire time they have operated theatres in said towns: (a) The *exclusive* privilege of selecting from the feature pictures released by said distributor such feature pictures as said exhibitors deemed suitable for exhibition in said towns, as and when prints thereof became available, before said pictures were released to any

other exhibitor in said town. (b) The *exclusive privilege* of receiving clearance on said feature pictures over competing theatres in said towns.

"43. The foregoing exclusive privileges have enabled the defendant exhibitors to *unreasonably restrain, suppress* and *entirely eliminate the competition offered* by *other* theatre operators in said towns in the *licensing* and *exhibition* of feature pictures by: (a) *Preventing* them from *obtaining enough first-class pictures* for *exhibition* on *any run* to operate their theatres successfully. (b) *Forcing* them to maintain admission prices *higher* than those warranted by the quality of the entertainment they were able to offer; that is, feature pictures previously exhibited or rejected by the defendant exhibitors. (c) *Preventing* them from showing any feature pictures released by the defendant distributors with first-run clearance in any of said towns. (d) *Preventing* them from exhibiting any feature pictures released by the defendant distributors with second-run clearance in any of said towns where any of the defendant exhibitors operate one or more second-run theatres."

"49. Each of the defendant exhibitors is what is commonly referred to in the motion picture industry as a circuit of theatres. As a result of the acquisition and operation of numerous theatres as hereinbefore alleged, the said exhibitors and each of them have obtained what is commonly referred to in the motion picture industry as *circuit buying power*. Said circuit buying power has *enabled* them and each of them to *obtain* the *exclusive privileges hereinbefore recited* from the defendant distributors. Said circuit buying power has *further enabled* them and each of them to *demand* and *receive* from *all distributors* of motion pictures *more favorable rental terms* in licensing their motion pictures than can be obtained by competing individual exhibitors.

"50. Said *circuit buying power* is now so great that its continued existence will tend to *subject* competing exhibitors in the Griffith Towns to *other and additional restraints* in violation of the Sherman Act, even if the foregoing restraints are enjoined, unless said circuit buying power is eliminated."

The defendants deny generally these allegations and upon the issues thus joined the cause was tried to the court.

The record is quite voluminous, containing close to 4,000 pages of testimony and many hundreds of exhibits, and exhaustive briefs were filed, which necessitates a much more lengthy opinion than in ordinary cases.

The production, distribution and exhibition of moving picture films comprise an industry that has arisen and developed during the past thirty years. In order that we may better understand the situation here, as it has been developed in the trial, it is appropriate to give a brief resume of the background of the development of the industry as it pertains to the defendants, as disclosed by the testimony.

During the thirty-year period immediately preceding the filing of the complaint in this cause, the motion picture industry has undergone marvelous changes and development.

These changes have been very marked not only in the production and distribution of pictures, but also in the exhibition of pictures. The showhouse or theatre in the smaller towns and in many of the larger ones, at the beginning of this period, consisted ordinarily of a remodeled storeroom equipped, often poorly, for exhibition purposes. Those originally engaged in the exhibition of pictures were persons of little or no experience in the business and usually their methods were as crude and inefficient as the houses in which they operated. The production of better and more attractive pictures called for more efficient methods in their exhibition. All of these developments have required substantial capital for the construction of modern theatres, installation of sound equipment, more efficient personnel, and advertising and exhibiting the production.

In many of the situations in the territory in question, the pioneer exhibitors have been slow to respond to the public demand for better showhouses, modern equipment and efficient service in the exhibition of pictures. This very positive progress in the development of the business not only has made the well-managed theatre a good business proposition,

but has resulted in an increased interest in the business by a more progressive element, willing to provide the capital and more efficient service to meet the public demand. In reviewing the evidence, the situations will be treated individually in order to determine whether or not the existing conditions are the natural and logical result of the gradual changes suggested by the demands of the public and the opportunities from a business standpoint, and will be considered only as affecting the territory involved in this action.

The testimony discloses that the moving picture industry, as it pertained to the exhibition of pictures, from its early inception until about 1928 or 1929 consisted of the exhibition of what is known as "silent films." During this period, very little effort was made by the exhibitors to construct showhouses or theatres adequate to accommodate the public. The accommodations were unsanitary, poorly planned and constructed, and were known throughout the industry as the "storehouse type" of theater. Particularly was this true as to the states of Oklahoma, New Mexico and the outlying districts of Texas. In the principal cities in Texas, however, many modern theater buildings were constructed. In 1928 or 1929 what is known as "sound equipment" was perfected and since that time we have had what is termed "talking pictures." The cost of the construction and equipment of a modern de luxe type of theater with sound equipment and a seating capacity of 600 to 1,000 was approximately $75,000. The successful installation of sound equipment in old buildings that had been converted into theaters necessitated much and expensive remodelling, at an approximate cost of $14,000. Stages in such buildings had to be reconstructed, ceilings raised or lowered, obstructions that would interfere with sound removed.

As the moving picture industry was so developing, the nation was experiencing what has been termed the "depression," with which all are familiar. Every line of business suffered and there were many failures due entirely to the depression. In order to supply the patronizing public with

adequate and comfortable showhouses or theaters, those engaged in the business who kept abreast of the steady and continuing progress and scientific development of the industry sought to provide such houses of entertainment, until today there is scarcely a town of 3500 population that does not have at least one or more modern theatre building.

Three of the defendants, R. E. Griffith, L. C. Griffith and H. J. Griffith (hereinafter referred to as the Griffith brothers), lived in the state of Texas. From 1915 to 1919, R. E. Griffiths and L. C. Griffiths were engaged as traveling salesmen for various distributors selling moving picture films to theater operators, except for about one year during the first World War when L. C. Griffith served as a soldier in the United States Army. As they traveled in the states of Texas, Oklahoma and New Mexico, they grew familiar with the theater situations throughout that territory. They became interested in the exhibition branch of the industry and acquired a lease of a building in San Marcos, Texas, and remodelled it into a theater. From that time forward their interest increased and from time to time they acquired, in whole or in part, other theaters. They financed these enterprises from what they could save from their salaries, supplemented with earnings from their ventures. The two brothers came to Oklahoma City, Oklahoma, in December, 1919. At that time they had acquired an interest in the "film exchange" industry with W. C. Underwood of Dallas, Texas. They organized such an exchange business in Oklahoma City under the firm name of Oklahoma Specialty Film Exchange. This organization dealt in and distributed what was then known as "state rights" pictures and was a Griffith brothers enterprise. In this line of endeavor the two brothers traveled extensively throughout the state of Oklahoma and became familiar with the theater situation in the various towns and cities. They conceived the idea of establishing modern theaters with modern equipment in various towns, as opportunities presented. In 1924 or 1925 they acquired the Rialto theater in Oklahoma City and placed their younger brother,

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H. J. Griffith, in charge of it as operator, where he continued until 1926. During this time each brother developed certain individual qualities for business as he became better acquainted with the industry. R. E. Griffith grew skillful in buying and booking films for theaters, an increasingly technical and difficult task. L. C. Griffith developed as an executive. H. J. Griffith became proficient in handling the problems involved in keeping the machinery in operating condition, and the buildings properly lighted, ventilated, equipped and repaired. They possessed in common the ability to recognize and appraise conditions in the industry. Up to 1926 they had worked together as a partnership and acquired theaters and interests in theaters in several towns and cities. They were handicapped for finances in their endeavor to extend their holdings. An opportunity presented itself in 1926 which they believed would provide them with sufficient capital to carry out their desires of expansion. Consideration of this opportunity resulted in a contract with the Universal Chain Theatrical Enterprises, by the terms of which the Griffith brothers were to organize a corporation to be known as the Griffith Amusement Company. The Universal Chain was to own a series of Class B stock in Griffith Amusement Company and was from time to time to furnish funds to the new organization as loans with interest at ten per cent. per annum, for the purpose of acquiring theaters. The Griffith brothers were to have the actual management of the Griffith Amusement Company and the final decision relative to the acquisition of theaters. L. C. Griffith became president of the corporation and still retains that office. R. E. Griffith continued as buyer and booker of films and H. J. Griffith continued in the capacity heretofore outlined. At the time of the organization of Griffith Amusement Company, the Griffith brothers owned fifteen theaters in various places in the territory, most of which were of the storehouse type. The contract with the Universal Chain continued in force and effect until sometime in 1928 when difficulty was encountered by Griffith Amusement Company in procuring

advancement of funds from the Universal Chain, and the contract was terminated. The stock owned by the Universal Chain in the Griffith Amusement Company was purchased by the Griffith brothers.

Some of the stockholders of Griffith Amusement Company did not endorse the acquisition of additional theaters and the Griffith brothers organized another corporation, the Consolidated Theatres, Inc., and later changed to Griffith Consolidated Theatres, Inc. The latter corporation acquired theaters as advantageous opportunities permitted. L. C. Griffith later became president of Consolidated Theatres, Inc., and that organization occupied the same offices as Griffith Amusement Company, with the same clerical force and with one overhead expense.

Griffith Amusement Company organized a department to furnish administrative services to theaters throughout the territory, including those of Consolidated Theatres, Inc. It furnished such services as the buying and booking of films, bookkeeping and auditing services, an auto trailer pick-up service to deliver film reels, and various other services valuable to theater operators, at a fee of four per cent. of the annual gross receipts, under what were called administrative contracts.

In acquiring an interest less than the full ownership of a theater, the purchase contract provided that the Griffith interest would have "exclusive charge of the buying and booking of films."

In the purchase of a theater, the contract usually provided that the seller would not engage in the theater business, directly or indirectly, in that community for a specified period of time, as a part of the consideration for the purchase of the "good will" of the seller.

In 1931, R. E. Griffith left the organizations as a regular salaried employee of Griffith Amusement Company and was never thereafter employed by Griffith Amusement Company or Consolidated Theatres, Inc., except as follows. Neither L. C. Griffith nor H. J. Griffith had acquired sufficient experi-

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ence in buying and booking films to carry on such work successfully for their theaters. The corporations then employed R. E. Griffith to buy and book films for the theaters in which they were interested until the 1938-1939 season, when his services as such were discontinued. In the meantime, H. R. Falls assisted R. E. Griffith in such service until 1938 when Falls assumed such duties for Griffith Amusement Company and Consolidated. From 1938 until his death in 1943, R. E. Griffith was in no way connected with buying and booking films for the two corporations.

At the time R. E. Griffith severed his connection with the organization in 1931, he exchanged his stock in Consolidated Theatres for three theaters owned by that corporation in New Mexico, but retained his stock in Griffith Amusement Company. He removed to New Mexico and formed two organizations through which he conducted the same character of business. One was incorporated December 23, 1931, as R. E. Griffith Theatres, Inc., and the other was incorporated March 27, 1936, as Westex Theatres, Inc.

The Griffith brothers are shown to have been exceptionally good theater operators, keeping constantly abreast of the development of a rapidly growing industry. Their accounts naturally were coveted by the producers and distributors of moving pictures.

The contentions of the Government, as stated in its brief, are: "that the defendants secured through acquisition of financial interests in competing theatres and by management agreements with them, a film purchasing power far greater than that possessed by any of its local competitors;" "that this power was used to secure contracts for exhibition rights to the films of the major distributors which gave the defendants an unreasonable control over the licensing of such film to others in numerous towns in the states mentioned;" "that this control was used to absorb or otherwise eliminate a number of actual and potential competitors;" and, "that the acquisition of such power by concerted action, apart from its illegal use, constitutes a violation of the Sherman Act."

The Government insists that the evidence justifies the conclusion as a matter of law that these contentions are sound, and stresses in its brief twenty five theater situations to sustain its position. These situations are taken up in detail in the findings of fact filed herein.

There are three parties involved in the industry in the exhibition of moving picture films—the producer, the distributor and the exhibitor. The producer and the distributor are closely allied, so much so that they are frequently one institution with two departments. The distributor has to rely upon the producer for product. The producer has to rely upon the distributor for the exploitation of the product. The production of moving picture films entails the expenditure of vast sums of money to meet weekly payrolls, et cetera. It is the function and business of the distributors to contact the exhibitors throughout the territory where they desire to exhibit the films. In doing this, the distributor is concerned in securing the best returns for the product he can obtain that will insure a steady income to keep the industry moving. The exhibitor is interested in buying the product at the lowest possible cost and in keeping a steady flow of the product for his theater, or theaters, of the kind and character he desires, at the times and places he desires to exhibit.

The product is copyrighted and is not sold to the exhibitor but is licensed to him for exhibition under certain terms and conditions. This practice has developed what is termed in the industry the "standard form" of contract, the provisions of which control except where they conflict with provisions in the "master" or basic contract. The evidence clearly discloses that the distributor selects his own customers and accounts and the exhibitor has no control over that phase of the industry. Many things are taken into consideration by the distributor in making that selection, such as the ability of the exhibitor to exploit the films in his community, his experience in exhibiting moving picture films, the facilities of his theater, his ability to pay for the product, and his integrity or lack of integrity.

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In the development of the trade in the industry, the distributor endeavored to have his exhibitor license the product for a year in a contract called a season contract. The solicitation began about the latter part of July or the first of August in each year. At that time the distributor had determined the kind and character of product he would be able to supply the exhibitor for that season. In most instances, the films had not yet been produced and no one knew how successful they would prove as box-office attractions, and in the season contract the exhibitor would be accorded the privilege of rejecting or eliminating a certain per cent. of the product during the season. Later, and during the time covered by the complaint, the distributor conceived the idea of licensing the product for a longer term than one season, and entered into a contract to license its product for a two, three or five-year period, which was called a franchise. This proved not to be advantageous to the distributor and has been discontinued by practically all of them. At the time the contracts were entered into between the distributors and the exhibitors, the terms and conditions were arrived at by "barter and trade."

Griffith Amusement Company, Consolidated Theatres, Inc., and the theaters with whom they had administrative contracts negotiated the licensing of films through R. E. Griffith, as their representative, until the 1938-1939 season. At the beginning of the season, as a matter of convenience, R. E. Griffith would go to the New York offices of the various major distributors, as it was the rule that all licensing contracts were required to have the approval of the New York office. There he would enter into negotiations with each distributor separately for the licensing of such of the output of films on hand, or to be produced, as he deemed would insure a supply which would reasonably meet the needs of the various towns in which they were to be exhibited, at the times they were needed. Such negotiations called for considerable ability and skill, and frequently took weeks to conclude. The negotiations with each distributor would be re-

duced to a memorandum agreement and later covered by a contract for each theater. These contracts always provided that the exhibition of the films was to be governed by the general provisions of the standard form of contract unless it was provided otherwise in the memorandum agreement.

Beginning with the 1938-1939 season, the negotiating for the licensing of films was done by H. R. Falls, as representative, and in much the same manner as theretofore except as to the place of negotiation. Instead of Falls going to New York, the representatives, or the state or district managers, of the distributors carried on their negotiations with Falls either in Oklahoma City, Oklahoma, or Dallas, Texas.

The evidence discloses that in all the contracts with exhibitors, the films were licensed either at a "flat rental" price or on a "percentage" basis. The contracts of the defendants Griffith Amusement Company, Consolidated Theatres, R. E. Griffith Theatres and Westex Theatres are practically all on a flat rental basis, although there are some percentage deals. The competitors of the defendants, aside from those with whom there were administrative contracts, were inclined more often to deal on a percentage basis. On the flat rental basis the exhibitor took a chance that he might lose on the deal, while on the percentage basis such chance was negligible. The testimony of all the major distributors is that in licensing the films, the Griffith theaters were treated the same as any other exhibitor.

As the industry developed the distributors began to license their films to be run for a second, third or even greater number of exhibitions, in towns and cities where they deemed it to be profitable. This caused some exhibitors to operate theaters for the exhibition of such runs almost exclusively. Such theaters are designated as second and third-run theaters. The second and third-run theaters supplement their product frequently by licensing films produced by other than the major producers, which are called "independents." The distributors alone determined in what localities second and third runs should be licensed and how much time should

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elapse between the first exhibition of a film and the second and succeeding runs of it.

All of the defendants, except R. E. Griffith who is dead, together with their representatives who took part in and concluded the negotiations for licensing product with the distributors covering the period of time set out in the complaint, have testified that they had no agreement or understanding with such distributors to in any manner control the exhibition of moving picture films in the various towns and theaters. They further testify that what was, or was not, to be licensed to their competitors in the various situations was never discussed or taken into consideration in such negotiations. Their testimony is corroborated by the representatives of the distributors who were present and negotiating with them in the licensing of product. There is no evidence to the contrary. The representatives of the distributors who took part in these negotiations testify that the buying power of the defendants was not considered the controlling factor in their negotiations, and some of them specify towns in the territory where they have never licensed their product first, second or third run to the defendants but have always licensed the product to their competitors.

The defendants further testify that they did not combine or conspire to unreasonably restrain trade in the moving picture films, or to stifle competition in the product, or to create a monopoly in it in the various situations in which they exhibited the films.

This brings us squarely to the consideration of the following propositions and the law as declared by our courts governing such situations.

1. Are the acts and conduct of the defendants, as shown by the evidence, in the acquisition and operation of their theaters in connection with their buying power, and the provisions of their contracts with distributors, such as to justify the inference that a conspiracy or combination exists upon the part of the defendants to control the exhibition of moving picture films, or to unreasonably restrain trade in such prod-

uct, or to stifle competition in such product, or to create a monopoly in the exhibition of moving picture films in the town in the territory covered by the complaint, in violation of the Sherman Act?

2. If the court would be justified in concluding that such an inference could be drawn, would the court be further justified in concluding that such inference should control over the positive and direct testimony of the witnesses to the contrary?

3. Is buying power alone, resulting from thrift, fair dealing and industry, sufficient to justify the inference that a combination or conspiracy exists for the purpose of, and is being used in negotiations to, unreasonably restrain trade, stifle competition, or create a monopoly in a given product, or must it be established by a fair preponderance of the evidence that a combination or conspiracy exists and has for its purpose the use of such buying power to obtain those specific results?

In considering the first proposition it may be necessary to repeat statements contained in our preliminary discussion.

Section 1, Title 15 U. S. C. A., provides, so far as it pertains to the case at bar, as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * *."

Section 2 provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a misdemeanor, * * *."

The Government contends that the defendants have by their acts and conduct in the territory and during the time set forth in its complaint violated the provisions of these

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sections. The Government assumes that the defendants were acting in unison and in a cohesive combination in their theater operations. The evidence does not sustain this contention.

The undisputed testimony is that the defendants, L. C. Griffith, R. E. Griffith and H. J. Griffith, operated as a partnership in the business of acquiring, operating and developing theaters until some time in 1926. There was nothing unlawful or unreasonable in that line of endeavor and they are not charged with any irregular conduct in it. In 1926 they incorporated their business as Griffith Amusement Company. Since that time, the acts of the brothers were those of officers of corporate bodies and not those of individuals, except the services performed by R. E. Griffith as buyer and booker of films. In 1928 another corporation was organized by these brothers, known as Consolidated Theatres, Inc. While the evidence discloses that these two corporations maintain their offices at the same place, it also shows that they are distinct entities and have had nothing in common with each other aside from the fact that since their organization, both have engaged in the exhibition of moving picture films. The uncontradicted evidence is that in 1931, R. E. Griffith severed his business connection with both Griffith Amusement Company and Consolidated Theatres and has had nothing to do with the business policies or operation of those two organizations since that time aside from serving them as agent and representative in purchasing and booking films for a consideration agreeable to the parties, until the season of 1938-1939 when he ceased to function in that capacity.

Neither Griffith Amusement Company nor Consolidated Theatres had any control of any character over the operations of R. E. Griffith Theatres, Inc., or Westex Theatres, Inc. Nor did R. E. Griffith Theatres, Inc., or Westex Theatres, Inc., have any control of any character over the operations of Griffith Amusement Company or Consolidated Theatres, Inc., during the time covered by the complaint, but

each has been, and was at the time of this trial, a distinct entity from the date of its organization.

The Government contends that the four corporation defendants were combined into one circuit of theaters and refers to it as "the Circuit." The evidence does not so disclose. It does disclose that each corporate defendant owned and operated a distinct circuit or chain of theaters.

The business or industry in which these defendants are engaged is competitive in many places. We are not concerned with those towns where there was no competition at the time of the filing of this complaint except any incidental bearing it might have upon competitive situations during the time covered by the complaint. "Competition," it has been said, "is the life of trade." The very law we have under consideration, the Sherman Act, has for its purpose the protection of competition. The law in every conceivable way has always favored it, when fairly conducted.

In *Sinclair Refining Company* v. *Federal Trade Commission*, 276 F. 686, 688 (CCA 7), the court said:

> "Competition is not an unmixed good. It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various. Superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. Expense attending the use of any weapon, the foolishness of it, the fact that a method is uneconomical, or that the competitor cannot meet any method or scheme of competition because it will be ruinous to him to do so, have not, nor has either of them, ever been held unfair. Such things are a part of the strife inherent in competition. * * *"

If the battle of competition is carried to its normal conclusion one competitor reaches a point of ascendency over the other, and the losing competitor naturally takes a secondary

position or is completely vanquished. They both cannot occupy the same position in the contest at the same time. It is a competitive contest and there is no rule of law, economics, or business that can strike and maintain an even balance between the participants during its progress. In the business in which the individual defendants were engaged, the exhibition of moving picture films, both competitors could not exhibit the same picture at the same time. The licensing of the film was the business of the distributor, and his choice of who should exhibit it and the terms and conditions under which he would license the film were matters that were wholly in his control. The distributor either had the film or was going to produce it; it was his article and was for license. The market was provided by the distributor; the various exhibitors knew where and from whom the article was to be licensed. The methods of the distributor were known to all. The evidence shows that the exhibitor either could go to headquarters direct and bargain or could wait for some representative to call on him and bargain through the representative. If the exhibitor was content to wait for the representative, or depend upon correspondence, he took his chances on supply. If upon the other hand he cared to go to headquarters and bargain, it was possible to get a better choice of product, just as it is in any other line of endeavor where one is engaged in retailing to the trade goods that are provided by wholesale dealers.

The evidence discloses that the defendants took advantage of the opportunities afforded them in the ordinary course of dealing during the time covered by the complaint. That was their privilege and there was nothing illegal or immoral about it, merely because they represented large interests or were able to make large deals. The evidence shows that the licensing was all arrived at by barter and trade, and the exhibitors all placed upon the same footing.

The attitude of the Government is one of suspicion. Many of the normal and natural occurrences and situations are given a sinister meaning and argued from that standpoint.

The proposition of what "could be done" or "might be done" under given situations is argued vigorously. But we are not concerned with that approach. Our concern is what the evidence discloses *was done,* and any fair inferences we can gather from those acts regarding the *intent* of those who acted. A fair indication of this attitude can be gathered from the Government's brief (p. 14) which states:

> "The ability of the defendant to withdraw from a particular major distributor the entire revenue from its closed towns was of course a major threat it possessed. When this is controlled by one individual negotiating with a distributor its effect is self evident."

The evidence fails to disclose that any threat was so made by R. E. Griffith or any other defendant in the negotiations for films, but to the contrary. The suggestion that any distributor on account of that ability was intimidated or compelled to sell films to the defendants is not supported by the evidence. If the mere ability to withdraw all purchases from a distributor in noncompetitive situations, unless the purchaser grants favors in competitive situations, is a threat then all exhibitors possessing two theaters, one in a competitive situation and one in a noncompetitive situation, violate the Sherman Act. Such argument is unsound and falls of its own weight.

The Government contends that "Section 1 of the Sherman Act was violated by unreasonable restraints on the interstate distribution of motion pictures resulting from: (a) each of the master deals and franchises between a distributor and the Griffith Circuit; (b) each of the agreements between exhibitors for collective licensing; (c) each of the agreements between exhibitors by which one agreed not to compete with the other either by a pooling arrangement or by a sale of goodwill, and (d) unreasonable restraints resulting from implied agreements between defendants and distributors." These contentions will be considered in order.

The Government assumes a state of facts not supported by the evidence. There are no master deals or franchises between any distributor and the "Griffith Circuit" shown in the evidence. The master deals and franchises in their final analysis are between a distributor and each of the four corporate defendants, or between a distributor and some individual exhibitor who is not a party defendant here. They are separate deals negotiated by an agent for the exhibitors upon the one hand and the various distributors individually upon the other hand. There is no evidence that there was any agreement, conspiracy or combination between the negotiators of the deals that had for its object granting to the defendant exhibitors any advantage or concession for the purpose of stifling competition, monopolizing the industry, or occasioning or bringing about any unreasonable restraint in trade in the product in such territory. The undisputed testimony is that such matters were never at any time discussed between the parties.

The master deals consist of either a memorandum agreement at the close of the negotiations signed by the parties, or in some instances, a letter from one party setting forth the terms and accepted by letter by the other party. Later these were approved by the proper officials of the distributors, which were followed by contracts embodying the agreement with the individual theater exhibitor. There is nothing in the evidence that indicates anything abnormal or unusual in these agreements.

As to the franchises, the evidence is that prior to the time covered by the complaint, the distributors conceived the idea of licensing their films for a longer period that one season. They sought out the exhibitors and endeavored to license them for a term of years, which resulted in contracts that were called franchises. They not only sought out the exhibitor operating a circuit of theaters, but also the exhibitor operating one theater. Such licensing became a part of the ordinary method and many operators of theaters had franchises for a term of two, three, and even five years. Later

most of the distributors concluded that in practical operation, a franchise was not desirable and discontinued the practice.

That such franchises were considered as a part of the ordinary method of contracting for moving picture films by all the trade is borne out by Section XV of the Consent Decree which provides: "The provisions of this decree shall not apply to any franchise which was signed prior to June 6, 1940."

The evidence discloses that the defendants entered into four of such franchise contracts. One executed May 8, 1930, for a term of five years, between Metro-Goldwyn-Mayer Distributing Corporation (now Loew's) and Griffith Amusement Company, Consolidated Theatres, Inc., and two other corporations not party defendants here. It was amended as to Griffith Amusement Company and Consolidated on April 20, 1933. At the time of the filing of the complaint it had practically one year to run. It was not renewed. One executed September 15, 1934, for a term of three years, between Paramount Pictures Distributing Company and Griffith Amusement Company, R. E. Griffith Theatres, Inc., Consolidated Theatres and fifteen other organizations not parties to this action, all represented by R. E. Griffith, agent for such parties. This franchise was not renewed. One executed March 19, 1935, for a term of three years between RKO Distributing Corporation and Griffith Amusement Company, R. E. Griffith Theatres, Consolidated Theatres and five other organizations not parties to this action, all represented by R. E. Griffith, as agent. This franchise was not renewed. One executed September 14, 1937, for a term of three years between Columbia Pictures Corporation and Consolidated Theatres, R. E. Griffith Theatres, Griffith Amusement Company and Westex Theatres, by R. E. Griffith, "authorized agent." This was not renewed.

During the time covered by the complaint, the defendants did not have franchises in effect with more than two distributors during any season. The franchises with Loew's

(MGM) and Paramount were in effect during the 1934-1935 season. The franchises of Paramount and RKO were in effect in the 1935-1936 and 1936-1937 seasons. Franchises were in effect with RKO for the 1937-1938 season, and with Columbia for the 1938-1939 and 1939-1940 season. Thus at least six of what is termed the major distributors had no franchises with the defendants during any season covered by the complaint. In view of that situation we fail to see how the franchises held by the defendants could seriously restrain commerce in the films. Certainly they did not unreasonably restrain it, regardless of any of the provisions in the franchises that appear upon their face.

But counsel for the Government insist there are provisions in those franchises that would justify the conclusion that special privileges were given to the defendants, and that by reason thereof, it can be inferred that some kind of an agreement or conspiracy was in effect between the parties to the franchise to restrain commerce, control product or monopolize.

Those provisions have been carefully considered. The argument is not based upon what has been done under the provisions, but is chiefly based upon what *could* be done, or how the provisions *could* be interpreted. For instance, in the Government's brief (p. 66), counsel states:

> "In the agreement with Columbia Pictures Corporation * * * the following clause appears, 'It is agreed that the exhibitor can revise the schedule of allocation by towns, provided the total amount of money by picture, in each classification, for the Circuit, remains the same.' * * * The effect on competition of such a right is too clear to require elucidation."

The counsel proceeds to elucidate as follows:

> "Under the terms of such contracts the Griffith Circuit could allocate the entire amount of rental to its most prosperous theatre and utilize all the others in the chain as fighting theatres to drive out the independent exhibitors in the other towns in which it exhibited the distributor's pictures. * * *"

There is no evidence in the record that any such conduct was indulged in by the defendants, or that such sinister thoughts occurred to them. There is a vast difference between what *might have been done* and what *could have been done* and what *was done.*

Counsel argues further in the brief (p. 67):

> "In the three-year franchise of Paramount Pictures, * * * the following clause appears, 'Distributor agrees to release exhibitor from the obligation covering any individual town which the exhibitor may find it necessary to close permanently.' The effect of such a clause is similar to that granted to allocate pictures between towns. It is also capable of the construction that a distributor may be entering into a pooling arrangement with a competitor decide to close his theatre in a particular town and thus restrain the interstate distribution of product."

This would be a strained construction of a simple and unambiguous clause in a contract, the ordinary and clear meaning of which is obvious.

Again counsel states (p. 67):

> "In the contract between the RKO and the Griffith Circuit * * * this clause appears, 'It is agreed that if the exhibitor shall during the term of this agreement open additional theatres in any of the towns covered herein, with the exception of Oklahoma City, that any of the feature photoplays and short subject photoplays may be exhibited therein in place of the theatres named herein.' The effect of this clause is to arm Griffith with an assured franchise to license pictures in any theatre which he may desire to open even though he decided to open it solely for the purpose of destroying a competitor's business. It is difficult to conceive of greater relinquishment of control of its film distribution than this one and its inclusion in a master deal belies the protestations that each theatre was considered in arriving at the rental prices fixed in the master deals.
>
> "Under the terms of this clause, the Griffith Circuit was empowered to open the flimsiest kind of a con-

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> verted store show immediately adjacent to its independent competitor and without fear of loss of product play the top pictures of the distributor."

This also is a strained construction. The clause is simple and plain and admits of no inference of a sinister or hidden meaning when the contract is considered as a whole. Counsel have overlooked many contingencies in arriving at such a construction. Here is a contract covering many towns. A theater may be destroyed by fire or storm; a lease may expire and cannot be renewed; local authorities may condemn a building for theater use. Any number of things might occur to cause an exhibitor to open another theater in a town covered by the contract. The exhibitor has provided himself by license with moving picture films to operate his theaters in a town over a period of time. Thus with good foresight and business judgment he provides for such a contingency. The clause does not give the exhibitor any new or additional product. It simply permits him in such event to use product, that under his contract he has obligated himself to play and pay for, by exhibiting the same film in the same town in a location other than the one named in the contract. This gives him no unfair advantage over his competitor, takes away none of his competitor's product, and certainly in no way unreasonably restrains commerce, nor can it be construed as an intent to monopolize.

Under proposition (b), "the agreements between exhibitors for collective licensing restrain competition and were an unreasonable restraint of trade," counsel for the Government argues as follows, (p. 68):

> "In some 48 instances, agreements were entered into under the terms of which booking of pictures would be handled by the Griffith Circuit. Each of these agreements pro tanto reduced the bargaining power of a major distributor and constituted a combination against him for the securing of the special privileges some of which have been discussed above. Moreover, they had the effect of preventing competition between the exhibitors entering into them for the booking was centrally controlled."

Again we have an assumption that all of the defendants were combined in one circuit which is far from being supported by the record. Counsel assumes this position from the fact that all of the defendants, until the 1938-1939 season, negotiated the purchase and booking of films through R. E. Griffith as agent for the parties involved in the deals.

There is no difference in principle in the instant case and the case of *Appalachian Coals, Inc. et al.* v. *United States,* 288 U. S. 344, 357, 359, 377, except in the case at bar it is contended the defendants were operating collectively by purchasing and booking through an exclusive buying agency and in the case cited an exclusive selling agency was under attack. In the discussion of it, Mr. Chief Justice Hughes said:

> "The challenged combination lies in the creation by the defendant producers of an exclusive selling agency. * * *"
>
> * * * *
>
> "First. There is no question as to the test to be applied in determining the legality of the defendants' conduct. The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. * * * The decisions establish, said this Court in Nash v. United States, 229 U. S. 373, 376, 'that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.' (Citing numerous authorities.)
>
> "In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, re-

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strains.' Chicago Board of Trade v. United States, supra. (246 U. S. 231) The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. * * *"

* * * *

"* * * The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies, and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. * * *"

If the Act "aims at substance" and if "realities must dominate the judgment" and we apply these principles here, then it is apparent that a similar condition confronted the defendants Griffith Amusement Company and Consolidated Theatres, at the time R. E. Griffith severed his active connection with them. It was good business judgment to procure his services for the corporations. He, by training and experience, was well fitted for it. What is abnormal about such an arrangement? But that is not all there is to the administrative agreements. Counsel apparently overlooks the fact that the agreements provide for many types of service, the buying and booking of films is only one incident, and that for all the services to be performed under it, a specified fee is to be charged.

The administrative contracts are of two general kinds or types. Counsel for defendants quite clearly describe them in their brief (pp. 70-71), as follows:

"One type is an agreement between one of the corporate defendants and a third party with whom it was jointly operating a theatre or theatres in a cer-

tain town, setting forth the terms of the partnership operation, the duties to be performed by each party, the compensation to be received by each party, the division of profits, and other details of the operating agreement."

"The second type of contract reflected in those exhibits is a contract between Griffith Amusement Company and Consolidated Theatres, Inc., or Consolidated Theatres, Inc., and its partner, as the owners and operators of theatres, whereby for an agreed percentage of the gross box office receipts Griffith Amusement Company agreed to perform certain services, including the licensing and booking of pictures."

Suffice it to say the objectionable paragraph pointed out by the Government is not the controlling feature of the contracts but is merely incidental. The contracts must be considered as a whole, and when so considered, there is nothing abnormal about them and no hidden or sinister meaning in them. There is nothing in them that signifies any intent to unreasonably restrain trade, stifle competition or monopolize.

Proposition (c), the agreements between exhibitors by which one agreed not to compete with the other either by a pooling arrangement or by a sale of good will constituted unreasonable restraints of trade, calls for a consideration of the facts and circumstances surrounding these two characters of transaction.

The alleged pooling arrangements stressed by the Government are in the situations at Chickasha, Enid and Stillwater, Oklahoma. The defendants designate them as partnership agreements. But regardless of their designations, they are agreements that affected local situations concerning economy, expense and efficiency in operation that called for that character of agreement. In the Chickasha situation, no competition of the two circuits was affected in any manner, and the mere fact that an unprofitable and unsuitable theater was abandoned and one party to be the contract finally became the owner of the theater by a mutual and satisfactory sale does not condemn the transaction as mo-

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nopolistic. In the Stillwater situation, under the circumstances surrounding the transaction, there is nothing sinister or abnormal about it. On account of the depression and the inexperience of Russ, the operator of the competing theater, it is apparent that his proposition to Griffith Amusement Company was reasonable, and the terms of the agreement had the effect of mutually assisting both organizations in the situation which was purely a local one. The Enid situation also was a purely local affair and there was nothing abnormal about the contract or its effect. All of these three contracts are shown by the evidence to have been brought about by efforts to economize and more efficiently operate, with no apparent desire to stifle competition, unreasonably restrain, or monopolize. "The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it" *Appalachian Coals, Inc.* v. *United States, supra.*

Under this contention, the Government stresses the restrictive covenant found in the contracts in the purchase of theaters. In these contracts, as a part of the consideration, it is provided that in purchasing the good will, the vendor is not to engage in the same business for a specified time and at a specified place. There is nothing abnormal or unusual in this character of contract. What is known as good will, that has been built up by an owner of a business, is a valuable asset, and in the sale of that business he should be able to profit by it. This right has been so recognized and approved by our courts.

A great many of these contracts are Oklahoma contracts and are governed by state statute.

Section 217, Title 15 Okl. St. Ann. 1941, provides:

> "Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by the next two sections, is to that extent void."

Section 218 of the same title provides:

> "One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city or part thereof, so long as the buyer, or any person deriving title to the good-will from him carries on a like business therein."

After carefully considering the Oklahoma contracts in view of the state statutes and the decisions of the Supreme Court interpreting them, there can be no question as to their validity in that state. The contracts concern the sale of theaters, leases, equipment, et cetera, as well as good will. The covenants stressed by the Government are all based upon the purchase of the good will of the vendor. Whether they violate the Sherman Act would depend upon the intent of the parties, or the results effected.

In *United States* v. *Addyston Pipe & Steel Company et al.*, 85 F. 271, 280, in discussing the character of contract under consideration, the court said:

> "The inhibition against restraints of trade at common law seems first to have had no exception. See language of Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26. After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced. It was of importance, as an incentive to industry and honest dealing in trade, that, after a man had built up a business with an extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell. It was equally for the good of the public and trade, when partners dissolved, and one took the business, or they divided the business, that each partner might bind himself not to do anything in trade thereafter which would derogate from his grant of the interest conveyed to his former partner.

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> Again, when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. * * *"

And again, in considering whether the contract effected an unreasonable restraint in trade, the court quoted with approval from the case of *Horner* v. *Graves,* 7 Bing. 735, as follows:

> "We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

In *Goldberg et al.* v. *Tri-State Theatre Corporation,* 126 F. 2d 26, 29, (CCA 8) an injunction was sought based upon the violation of a restrictive clause in a contract similar to the one at bar. In passing upon the clause as to whether it effected a restraint in trade, the court said:

> "The validity of the agreement, as a restraint upon trade, is not seriously open to question under the general contract law of Nebraska. An agreement which places a restriction upon the use of certain real estate is not invalid in Nebraska, as being an unreasonable restraint of trade, where the restriction is purely ancillary to the acquiring of an interest in another piece of real estate for commercial purposes; where it places only a limited restraint as to period and manner of the use of such property; where it does not appear to be greater than reasonably to serve as a protection in accomplishing the legitimate commercial purpose

> for which the interest in the other real estate involved was acquired; and where it does not have as its primary object or as its direct result the fostering of some illegal monopoly."

And in summing up the transaction, the court said:

> "Under all the circumstances of the transaction, it must be held that the restrictive agreement was intended simply and fairly to protect the interests created by the new sublease and the purchase of the 99 year leasehold; that it was only such a reasonable protection as any purchaser in good faith would have required under the circumstances of the transaction; that the situation which prompted the deal and the relationship in which the parties dealt afford no sound basis for inferring that it was dominated by any purpose of fostering an illegal monopoly under a previous combination and conspiracy, if any such combination ever had existed, as appellants contend; and that, so far as the public was concerned, it was not intended to and did not serve to achieve any such harmful or illegitimate result."

The situations involved in the Oklahoma contracts containing the restrictive clauses could not be stated in more apt language. Under all the facts and circumstances surrounding the various Oklahoma contracts, they appear both valid and reasonable.

The Government particularly stresses the covenant in the contract of sale between A. M. Morgan and Jack Pickens, as agent for the Brady Amusement Company, Westex Theatres and R. E. Griffith Theatres, in which Morgan sold the Ritz theater at Brady, Texas. The evidence clearly discloses that Morgan's purpose in acquiring theaters was not so much with the idea of operating the theaters as it was to sell out to a competitor. Under the circumstances surrounding that sales transaction it is quite easy to understand why the purchaser might desire such a covenant in the contract of sale that was agreed upon, which was that Morgan "will not engage in the moving picture business or theatre business

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of any kind or character, directly or indirectly, in any town in the States of Texas, Oklahoma and New Mexico in which he might be in competition with Brady Amusement Company, Westex Theatres, Inc., or the R. E. Griffith Theatres, Inc., for a period of five years from this date." If the provision in the contract were put to a test, it may be admitted that it would be held to be valid as to the town of Brady, Texas, and invalid as to the other territory attempted to be covered. But so far as it affects the question before us, taking into consideration the facts and circumstances surrounding the transaction, there is nothing that would justify the conclusion that the parties defendant who were parties to this contract were in a conspiracy or combination to control the exhibition of moving picture films at Brady, Texas, or any other place, or that the restrictive convenant in the contract would justify the conclusion that there was an intent upon the part of those defendants to stifle competition in the exhibition of films, or to unreasonably restrain interstate trade or commerce in them, or that it had any such effect. The sale as it was ultimately closed was initiated by Morgan and was satisfactory to him. He was not unreasonably restrained in the town of Brady, Texas, and he makes no complaint that he was so restrained at any other place. The public was in no manner adversely affected by the transaction.

As to proposition (d), that the Sherman Act was violated by unreasonable restraints resulting from implied agreements between defendants and distributors. The court is not required to search for implied agreements in the face of the fact that the agreements are all written, signed by the parties, and are unambiguous in meaning. We are again called upon to speculate and guess at some hidden or concealed perfidy that does not appear in the instruments themselves. Where a conspiracy is charged, it is the duty of the court to scrutinize and consider carefully any and all transactions that would throw any light upon the issue, and where the evidence consists of written agreements, those agreements

and the circumstances surrounding their execution should be considered carefully. The purpose of the agreement, the object the parties had in mind and the results accomplished must all be considered. But when that is done and no serious fault found in the instruments, then it is not the duty of the court to speculate and guess as to what *could be done* or what *might be done,* or the effect that *might be accomplished* under the agreement, when the possible purpose was totally foreign to what the parties expressed in the agreement.

The Government contends that "Section 2 of the Act was violated by the defendants in monopolizing the business of operating theatres and the supply of major films." Under this contention, buying power and its effect are again emphasized. This question has had consideration in discussing the previous contention. Suffice it to say here that the evidence fails to disclose that the defendant exhibitors in the buying and booking of moving picture films contracted for any greater supply of product than they believed was reasonably necessary to supply the demands of the public in the various situations. In the purchase of their product, the positive evidence is quite clear that there was no intent upon the part of the defendants to control, stifle competition in or monopolize the industry in the territory, or to unreasonably restrain interstate distribution of moving picture films. For that reason it is not apparent how the case of *United States* v. *Aluminum Company of America et al.,* 148 F. 2d 416, relied upon by the plaintiff, applies here. The distinction is clear. Speaking of the Aluminum Company, the court said:

> "* * * It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. *Nothing compelled it to keep doubling and redoubling its capacity* before others entered the field. * * *" (Emphasis supplied.) Id. p. 431

In the case at bar we have no such situation. There is a vast difference between ingots and moving picture films. Ingots

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of aluminum are a staple and fixed product. Moving picture films are a fluctuating and uncertain product. Until a film has been exhibited no one knows or can accurately estimate its value as a box-office attraction, either as a first-run exhibition or a subsequent run exhibition. What the demand for its exhibition may be by the public is an unknown factor. The market in which it is procured by the exhibitor is a competitive one in which all exhibitors may enter and compete in compliance with the rules and customs of the industry, as they then exist, to obtain the product. Unless some unfair or illegal advantages are taken by one competitor, his rival in business should not be heard to complain because he has been unsuccessful in procuring the product.

Second proposition: If the court would be justified in concluding that such an inference could be drawn, would the court be further justified in concluding that such an inference should control over the positive and direct testimony of the witnesses to the contrary?

When conspiracy is one of the elements of the charge against a defendant, the very charge itself is of such a nature that circumstantial evidence may be the character of evidence that will be relied upon to sustain the charge. The law imposes upon the plaintiff the burden of sustaining the allegations of his complaint by a preponderance of the evidence. In a case such as we have here it is the duty of the court to determine whether or not the allegations of the complaint are so sustained. The court is entitled to have presented positive evidence when it is obtainable, and not be compelled to search the record for inferences that may be drawn.

The positive testimony concerning the transactions and conduct of the parties by those who were in a position to know, so far as the negotiations of the defendants and various distributors are concerned, is that no combination, understanding or agreement existed between them that had for its purpose the control of the exhibition of moving picture films by any of the defendants, or any unreasonable restraint

in trade in the product, or monopolization by the defendants of the product, or the stifling of competition upon the part of the defendants and the distributors. In fact they all state that the competitors of the defendants were never mentioned in the negotiations for film contracts. The Government, however, from testimony detailing trivial circumstances which in each case is positively denied by witnesses who appear to the court to be worthy of belief, in connection with the documentary evidence, assumes that the court must infer the existence of a combination and conspiracy.

The Government cites *United States* v. *Crescent Amusement Company et al.*, 323 U. S. 173, and *United States* v. *Schine Chain Theatres, Inc., et al.*, 63 F. Supp. 229, (DCC., N. Y. Oct. 8, 1945.) When these two cases are analyzed they are easily distinguished from the case at bar. In the Crescent Amusement Company Case, many of the things charged by the Government, which are similar to the charges here, the trial court found to be sustained by the evidence. Upon the appeal the only question before the court was whether there was evidence to sustain the lower court, and the court said:

> "The crux of the government's case was the use of the buying power of the combination for the purpose of eliminating competition with the exhibitors and acquiring a monopoly in the areas in question. There was ample evidence that the combination used its buying power for the purpose either of restricting the ability of its competitors to license films or of eliminating competition by acquiring the competitor's property or otherwise. For example, the defendants would insist that a distributor give them monopoly rights in towns where they had competition or else defendants would not give the distributor any business in the closed towns where they had no competition. * * *" Id. 181.
>
> "* * * But the vice of this undertaking was the combination of several exhibitors in a plan of concerted action. They had unity of purpose and unity of action. They pooled their buying power for a

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> common end. It will not do to analogize this to a case *where purchasing power is pooled so that the buyers may obtain more favorable terms.* The plan here was to crush competition and to build a circuit for the exhibitors. * * *" (Emphasis supplied.) Id. 183.

Although the charge is similar to the charge in the instant case, the proof is not. In the case at bar there is no testimony by any witness to that effect, but the testimony is to the contrary.

The *Schine case, supra,* is not applicable here for the same reason and is thus clearly distinguishable. It is true that the Government followed practically the same pattern in its charges in that case as in the instant case. But in the *Schine* case it satisfied the court with ample proof to sustain the charges and in the case at bar it has wholly failed to sustain the charges by a fair preponderance of the evidence.

The Government also cites the case of *Interstate Circuit, Inc., et al.* v. *United States,* 306 U. S. 208, 213. This case is also easily distinguished. There the court again was passing upon the sufficiency of the findings of fact to support the decision of the court and stated:

> "The case is now before us on findings of the District Court specifically stating that appellants did in fact agree with each other to enter into and carry out the contracts, which the court found to result in unreasonable and therefore unlawful restraints of interstate commerce."
>
> * * * *
>
> "The trial court *drew the inference of agreement from the nature of the proposals made on behalf of Interstate and Consolidated;* from the manner in which they were made; from the substantial unanimity of action taken upon them by the distributors; *and from the fact that appellants did not call as witnesses* any of the superior officials who negotiated the contracts with Interstate or any official who, in the normal course of business, would have had knowledge of the existence or non-existence of such an agreement among the distributors. This conclusion is challenged

by appellants because not supported by subsidiary findings or by the evidence. We think this inference of the trial court was rightly drawn from the evidence. * * *" Id. 221 (Emphasis supplied.)

And the court further amplified as follows:

"* * * Taken together, the circumstances of the case which we have mentioned, *when uncontradicted and with no more explanation than the record affords,* justify the inference that the distributors acted in concert and in common agreement in imposing the restrictions upon their licensees in the four Texas cities.

"This inference was supported and strengthened *when the distributors, with like unanimity, failed to tender the testimony, at their command,* of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action. When the proof supported, as we think it did, the inference of such concert, the *burden rested on appellants of going forward with the evidence to explain away or contradict it.* They undertook to carry that burden by calling upon local managers of the distributors to testify that they had acted independently of the other distributors, and that they did not have conferences with or reach agreements with the other distributors or their representatives. *The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants.* The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. (Citing authorities.)" (Emphasis supplied.) Id. 225.

Even if the court would be justified in inferring from the Government's evidence, consisting largely of a documentary character, that a combination or conspiracy existed upon the part of the defendants and distributors as alleged in the complaint, and the burden was thus cast upon the defendants

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to "explain away or contradict it," the defendants have met and discharged that burden to the thorough satisfaction of the court with positive evidence from those officers of the distributors who negotiated with the defendant exhibitors.

Third proposition: Is buying power alone, resulting from thrift, fair dealing and industry, sufficient to justify the inference that a combination of conspiracy exists for the purpose of, and is being used in negotiations to, unreasonably restrain trade, stifle competition, or create a monopoly in a given product, or must it be established by a fair preponderance of the evidence that a combination or conspiracy exists and has for its purpose the use of such buying power to obtain those specific results?

When we come to consider this proposition, the law is well settled that the size of an institution, regardless of a power that might be exercised on account thereof, is not in itself an offense against the statute. The principle is well expressed in *United States* v. *International Harvester Company et al.*, 274 U. S. 693, 708, where the court said:

> "* * * The law, however, does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power. United States v. Steel Corporation, 251 U. S. 417, 451. * * *"

In *Federal Trade Commission* v. *Paramount Famous-Lasky Corporation et al.*, 57 F. 2d 152, 157, the court said:

> "* * * But the size alone does not give rise to a violation of the law. United States v. International Harvester Co., 274 U. S. 693, 47 S. Ct. 748, 71 L. Ed. 1302; United States v. U. S. Steel Corp., 251 U. S. 417, 40 S. Ct. 293, 64 L. Ed. 343, 8 A. L. R. 1121. * * *"

In *United States* v. *United States Steel Corporation et al.*, 251 U. S. 417, 450-451, the court said:

> "* * * The Government, therefore, is reduced to the assertion that the size of the Corporation, *the*

power it may have, not the exertion of the power, is an abhorrence of the law, or as the Government says, 'the combination embodied in the Corporation unduly restrains competition by its *necessary effect,* (the italics are the emphasis of the Government) and therefore is unlawful regardless of purpose.' 'A wrongful purpose,' the Government adds, is 'matter of aggravation.' The illegality is statical, purpose or movement of any kind only its emphasis. To assent to that, to what extremes should we be led? Competition consists of business activities and ability—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained? To such paternalism the Government's contention, *which regards power rather than its use* the determining consideration, seems to conduct. Certainly conducts we may say, for it is the inevitable logic of the Government's contention that competition must not only be free, but that it must not be pressed to the ascendancy of a competitor, for in ascendancy there is the menace of monopoly.

"We have pointed out that there are several of the Government's contentions which are difficult to represent or measure, and, the one we are now considering, that is the power is 'unlawful regardless of purpose,' is another of them. It seems to us that it has for its ultimate principle and justification that strength in any producer or seller is a menace to the public interest and illegal because there is potency in it for mischief. The regression is extreme, but short of it the Government cannot stop. The fallacy it conveys is manifest.

"* * * The Corporation is undoubtedly of impressive size and it takes an effort of resolution not to be effected by it or to exaggerate its influence. *But we must adhere to the law and the law does not make mere size an offence or the existence of unexerted power an offence.* It, we repeat, requires *overt acts* and trusts to its prohibition of them and its power to repress or punish them. It does not *compel* competition nor require all that is possible." (Emphasis supplied.)

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In *United States* v. *Standard Oil Company of New Jersey et al.*, 173 F. 177, 196, in discussing the principle of law under consideration here, Mr. Justice Sanborn said:

> "* * * On the other hand, Congress did not intend to impede legitimate commercial activity, nor put a limit to its fruits. The genius and industry of man, when kept to ethical standards, still have full play, and what he achieves is his; and this applies as well to a corporation, in which the energies of many are concentrated under the authority of law in a single organization. A railroad company, for instance, which has extended its line across the continent and conquered the waste or wilderness, is not a monopoly within the statute merely because its capital is great and it alone serves the tributary country; and so of an industrial corporation, the wisdom and business sagacity of whose managers have foreseen and taken advantage of the natural tendencies of trade and caused it to outstrip all competition. Success and magnitude of business, the rewards of fair and honorable endeavor, were not among the evils which threatened the public welfare and attracted the attention of Congress. But when they have been attained by wrongful or unlawful methods, and competition has been crippled or destroyed, the elements of monopoly are present. * * *"

The theories and contentions of the parties have been patiently followed by the court but there is nothing in the evidence to justify the conclusion that any buying power possessed by the defendants was ever exerted by the defendants to "secure contracts for exhibition rights to the films of the major distributors which gave the defendants an unreasonable control in licensing such film to others in the various towns in the territory covered by the complaint." There is nothing in the evidence that would justify the conclusion that the buying power of the defendants was used to absorb or otherwise eliminate a number of actual and potential competitors, nor that would justify the conclusion that the possession of the power or the manner in which it was used is a violation of the Sherman Act.

The Government has failed to establish by a fair preponderance of the evidence that the defendants have purchased or contracted for more moving picture films than they believed were, or in fact were, unreasonably necessary to supply their theatres. Competition was fair under the circumstances of each situation involved. The defendants went into the open market and bought their product from the distributors in the same manner as was open to all competitors. The defendants were alert and progressive and took such advantages only as were natural in the industry. There is nothing in the evidence to justify the conclusion that the distributors were overawed or overreached in their dealings with defendants; or that the distributors were compelled or coerced into entering into any contract with the defendants by reason of the buying power of the defendants, or from any other cause. There is no evidence that would justify the conclusion that any combination or agreement of any character existed between the defendants and the distributors that had for its purpose the stifling of competition in, or monopolization of, the exhibition of moving picture films, or to unreasonably restrain trade or interstate commerce in such exhibition of moving picture films, that has been occasioned or brought about by the manner in which the defendants used any buying power they possessed.

Finding of fact and conclusions of law will be filed simultaneously with this opinion. A form of judgment consistent with this opinion and the findings of fact and conclusions of law may be submitted within fifteen days from this date.

United States District Judge

Dated this 9th day
of October, 1946

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In the District Court of the United States for the Western District of New York

CIVIL ACTION NO. 223

UNITED STATES OF AMERICA, PLAINTIFF

v.

SCHINE CHAIN THEATERS, INC. ET. AL., DEFENDANTS

STATEMENT OF THE UNITED STATES OPPOSING JURISDICTION OF THE SUPREME COURT AND MOTION TO DISMISS OR AFFIRM

This is an appeal from an amended judgment of the United States District Court for the Western District of New York, entered on March 29, 1946, which granted injunctive relief under Section 4 of the Sherman Act as to various unlawful trade practices and conspiracies found to have been employed by a group of corporations and individuals operating motion picture theatres. The defendants were also found to have violated Sections 1 and 2 of the Sherman Act by monopolizing theatre operations in numerous towns ranging in population from 5,000 to 35,000, and the judgment further provides that "the defendants and their affiliated corporations be dissolved, realigned, or reorganized in their ownership and control so that fair competition between them and other theatres may be restored and thereafter maintained."

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As originally entered on October 31, 1945, this provision, designated in both the original and amended judgments as Section III, contained two additional sentences giving each side sixty days from that date to submit to the Court such plans as they thought appropriate to carry out this provision, and thirty days after service of such plans in which to file written objections or such counter or substitute proposals as they might care to submit. On February 25, 1946, timely motions to amend the findings and judgment previously made by both sides were heard, at which hearing the Court refused a request of the defendants to postpone consideration of any plan to effectuate Section III of its judgment until the defendants' appeal to this Court had been disposed of. A plan to effectuate Section III had then been filed by the plaintiff, but no plan was filed by defendants. The Court ordered them to file their objections to plaintiff's plan by March 25, 1946, and set the plan and objections for hearing on April 16, 1946. Their objections were filed on April 1, 1946, pursuant to a stipulated extension.

On March 11 the Court filed an opinion disposing of the motions to amend the findings and judgment, which resulted in the entry of the amended judgment on March 29, here appended. At the hearing on April 16 defendants' counsel obtained leave of the Court to file a tentative plan on May 7 and to file a reply by that date to a reply filed by the Government on April 12 to the

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objections filed by the defendants on April 1. On May 7 defendants filed a tentative plan and a memorandum replying to plaintiff's reply. At the same time the Court requested plaintiff to comment on this tentative plan by May 20 and set May 28 as the date on which it would consider the defendants' tentative plan and the plaintiff's comments thereon. Plaintiff filed its comments on the defendants' plan with the Court on May 16. On May 28 the defendants filed a motion for leave to submit evidence on this issue before the Court or a master, which was taken under advisement.

No further proceedings had occurred at the time this statement was prepared.

Jurisdiction of the appeal is invoked under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C., Sec. 29. See also Section 238 of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C., Sec. 345.

ARGUMENT

This case involves appeals from Section II of the judgment, which contains the injunctive provisions, and Section III, which contains the soon-to-be-implemented general direction for divestiture. As to the latter, we think the appeal premature, both because Section III is not a "final decree" within the meaning of the Expediting Act, and because, in the alternative, the Court should in its discretion refuse to hear an appeal from such a general instruction when a judgment

embodying a specific plan is presently being considered by the lower court.

Since the injunctive provisions of Section II are to be considered in relation to the judgment as a whole, appeal as to them may also be premature. Assuming that this portion of the judgment is properly before the Court, however, it raises no substantial issue not determined by this Court in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, and could appropriately be affirmed on motion without further review. This will appear from the opinion and findings of Judge Knight, which are amply supported by the evidence in the transcript of record.

The Expediting Act (15 U. S. C. 29) authorizes appeals to the Supreme Court from any "final decree" of a district court in a civil proceeding brought by the United States to enforce the Sherman Act. In this case, there is as yet no "final decree" within the meaning of this Act as to Section III of the judgment, although proceedings are pending which should soon result in the entry of a judgment which will have finality for appellate purposes.

In this case the crux of the judgment will be the plan adopted to implement Section III. A temporary consent order was entered in this case on May 19, 1942, which made effective injunctive provisions pending a continuance of the case, which are similar to those now embodied in Section II of the judgment. The temporary consent

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order also provided for the divestiture of all theatres acquired by the defendants during the pendency of the suit and a stay of further acquisitions without Court approval.

The only question of substance which will be presented on appeal from the final judgment entered in this case will be the extent and character of relief granted pursuant to Section III of the judgment. That section is now in a form so abstract that it requires no action or inaction of any kind on the part of any defendant. Judgments which on their face are merely preparatory to the entry of a further order granting relief in concrete terms are not appealable prior to the entry of such further orders. *Green* v. *Fisk*, 103 U. S. 518; *Keystone Iron Co.* v. *Martin*, 132 U. S. 91. Until the district court has acted upon the plans now before it to implement Section III of the judgment, this Court will not have before it a final expression of the view of the district court as to what constitutes adequate relief in this case.

In *United States* v. *Eastman Kodak Co.*, 255 U. S. 578, the defendants appealed from a judgment of divestiture which was to be supplemented by the filing of a plan, but the general nature and extent of the divestiture ordered had been clearly specified in the judgment pursuant to plans previously submitted by both parties in accordance with procedure outlined in the district court's opinion. In that case the United States did not question this Court's jurisdiction of the appeal.

There was no ruling on the question by this Court since the appeal was dismissed on the appellants' motion. Apart from this case we know of no instance in which a Sherman Act defendant has sought to appeal from a judgment of divestiture or dissolution pending adoption by the district court of a plan to put it into effect.

The present appellants will undoubtedly appeal from the final judgment entered pursuant to Section III of the judgment now in effect and the United States might also appeal from such final judgment if it felt that the final judgment failed to give adequate relief. Obviously the present appeal, if it is to be entertained by this Court, should be heard and determined together with any such later appeals.

For the reasons previously stated, it is respectfully submitted that the appeal should be dismissed as premature or, in the alternative, dismissed as to Section III and the judgment affirmed as to Section II. If the Court should be of the opinion that it has probable jurisdiction, we suggest that the hearing of the argument should be postponed until there come before the Court such appeal or appeals as may be taken from the further judgment entered by the district court to effectuate Section III of its judgment.

[S] J. HOWARD MCGRATH,
Solicitor General.

MAY 29, 1946.

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No. 571. SCHINE CHAIN THEATRES, INC. ET AL. *v.* UNITED STATES. Appeal from the District Court of the United States for the Western District of New York. December 16, 1946. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a final judgment. *Edward F. McClennen, Willard S. McKay* and *Arthur Garfield Hays* for appellants. *Solicitor General McGrath* for the United States. Reported below: 63 F. Supp. 229.